SUBMISSION OF CMRRA-SODRAC INC. (CSI)

TO THE LEGISLATIVE COMMITTEE ON BILL C-32

January 20, 2011

EXECUTIVE SUMMARY

Together, CMRRA and SODRAC represent the reproduction rights of more than 90% of the musical works sold or broadcast in Canada. **CSI opposes proposed amendments in the Bill** that would: eliminate the revenues they receive from broadcasters, add new, uncompensated exceptions, and fail to modernize the private copying provisions of the *Copyright Act*. In 2009-10, private copying and licensing the reproduction right to broadcasters accounted for $34.9 million, or 45%, of the royalties CSI collected, all now in jeopardy. The 1997 changes to the *Act* strengthened Canada's framework of collective management and blanket licensing; Bill C-32 would reverse that progress and prevent new revenue generation from other modern uses of a creator's exclusive reproduction right.

Section 30.9: Ephemeral Recordings – Broadcasting Undertaking

Do not repeal the existing s. 30.9(6) of the *Act*, which provides that there is no exception where a licence is available from a collective society. The amendments proposed to s. 30.9(1) and s. 30.9(4) are reasonable only if s. 30.9(6) remains in the *Act*. Otherwise, technology will convert the intended "ephemeral" reproduction exception into a complete radio and television broadcasting exception. Broadcasters can easily comply with the requirement that copies be destroyed within 30 days by making copies of copies, at little to no additional cost, while continuing to have the use of the work indefinitely.

Contrary to false claims made by the CAB, the evidence demonstrates the following:

- **Reproductions of musical works have value**, providing broadcasters with lower costs, optimized efficiencies, and increased profitability.
- **Broadcasters are able to pay.** Recorded music represents 80% of commercial radio stations' program content, yet total royalties are just 5.7% of total revenue. Their 2009 pre-tax profit margin was 21.4%.
- **Notwithstanding limited exceptions in some other countries, broadcasters still pay for the reproduction right**. The U.S. exception is very narrow and not comparable to the proposal in Bill C-32. Very substantial royalties are paid in the U.K. and the Netherlands. Germany, Spain and Mexico's exceptions permit only a single use of a reproduction. France, Greece, Switzerland, Belgium and Austria provide no exception.

Section 30.71: Reproduction for Technological Processes

Proposed new s. 30.71 should be withdrawn. The value of reproduction rights should continue to be determined by negotiation or the Copyright Board. In the alternative, the section should be modified, as required by the Berne Convention, to avoid devastating effects on normal use and compensation. Exempt reproductions should **include only those with no significant economic value whose duration** is **no more than transitory. The exemption should expressly not apply to reproductions subject to ss. 30.8 and 30.9.**

Section 29.24: Backup Copies

Amendments are required to limit the application of this overreaching and unenforceable proposed exception. CSI recommends the Bill be amended to permit the making of one backup copy only, and to exclude copies already covered by a contract, licence, tariff or existing statutory scheme, including Part VIII, and copies made by broadcasters.

Section 29.23: Fixing Signals and Recording Programs for Later Listening or Viewing

If the government wishes to legalize the recording of broadcast television programs for later enjoyment, it **should not inadvertently legitimize less common practices for which rightsholders are currently compensated**, including the reproduction of content transmitted by online and satellite radio services. Section 29.23 should prohibit the sale, rental or other distribution of copies, and require that the copies be only for the "private use" of those who make them. It should also **exclude programs transmitted by subscription services and on-demand services**, and should **not apply to single works**, which would erode the market for digital downloads.

Section 29.21: Non-Commercial User-Generated Content

Section 29.21 **requires major amendments to limit its application**, including the following:

- Limit the exception to online dissemination, excluding physical media;
- Require that any existing works used are obtained legally;
- Consider the effect that widespread use or dissemination of an existing work in UGC – not just a single individual instance – would have on the market for the original work or other subject matter;
- Explicitly build in the Berne three-step test to ensure Canada meets international obligations;
- Explicitly require consideration of the moral rights of authors and performers; and
- Exclude intermediaries like YouTube from the exception if a licence is available from a collective society.

"Non-commercial" must be defined in relation to "private use" and "private purposes." Individuals should not be free to build libraries of whole works extracted from UGC for "private purposes" without payment.

In the absence of these amendments, the proposed UGC exception should be withdrawn. The creation of UGC can be dealt with under the existing law of fair dealing, and the marketplace for licensed uses of the reproduction right should be left intact. No other country provides an exception for User-Generated Content.

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SUBMISSION OF CMRRA-SODRAC INC. (CSI)
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INTRODUCTION

1. CMRRA-SODRAC INC. (CSI) is a joint venture created in 2001 by the Canadian Musical Reproduction Rights Agency Limited (CMRRA) and the Society for Reproduction Rights of Authors, Composers and Publishers in Canada (SODRAC). Together, CMRRA and SODRAC represent the reproduction rights of more than 90% of the musical works sold on CD and online or broadcast in Canada. For convenience, references in this document to CSI are inclusive of CMRRA, SODRAC and CSI.

2. Bill C-32, if passed as drafted, would reduce the protection currently afforded to authors and publishers and, as a result, would greatly reduce their ability, both now and in the future, to receive remuneration when musical works are fixed or reproduced.

3. The proposed amendments in this Bill represent an attack on the collective management and blanket licensing of protected works in Canada. Since 1997, the *Copyright Act* has given collective societies such as CSI that operate under the general regime set out in sections 70.1 *et seq.* of the *Act*, the option of filing a proposed tariff with the Board. The result has been a streamlined and efficient system that has provided users with easy access to musical works, without creating administrative difficulties or unnecessary transaction costs, while still ensuring payment to rights holders.

4. CSI recognizes that it is sometimes difficult from a practical perspective for users of musical works to locate and clear the rights for individual musical works. In a digitally-networked environment, in which quick and easy access to works is of paramount importance to users, collective licensing is perhaps the only effective way to ensure that rights owners are paid. Indeed, it should be an essential element of any serious attempt to "modernize" copyright law. It is therefore particularly ironic that the approach taken in Bill C-32, which the government has called the *Copyright Modernization Act*, would replace the practical and fair system that was created in 1997 with a series of exceptions granting businesses and individuals access to protected works without any compensation for rights holders. That constitutes expropriation, not modernization.

5. The provisions of Bill C-32 would reduce the remuneration of authors and publishers of musical works in the following ways:

    - the Bill as drafted would eliminate the revenues authors and publishers now receive from broadcasters when reproductions of musical works are made and used for broadcasting purposes;
    - new subsections 30.71 (Temporary Reproductions for Technological Processes), 29.24 (Backup Copies) and 29.23 (Fixing Signals and Recording Programs for Later Listening or Viewing) would further reduce the requirement to make payments when musical works are reproduced; and

- the Bill's provisions, by failing to modernize the private copying provisions of the *Act*, would result in phasing out the private copying levy, which currently generates royalties for rights holders when individuals copy musical works without approval or payment..

6. In addition, the Bill would all but eliminate an important emerging market for the reproduction of musical works by creating a broad exception for the uncompensated use of musical works in user-generated content.

7. This submission focuses first on the proposal to exempt broadcasters from the requirement to pay for the right to reproduce musical works. It also addresses the intended scope and application of the other proposed provisions referred to above, with the exception of the private copying issue, which is being addressed separately by the Canadian Private Copying Collective (CPCC). CSI fully supports the analysis and recommendations of CPCC. The revenues CMRRA and SODRAC received from the levy in 2009 are shown in Table 1, below.

IMPACT OF PROPOSED AMENDMENTS ON EXISTING ROYALTIES

8. Much greater use is being made of the reproduction right now than a decade ago. Recent technological developments have made it increasingly easy and inexpensive for businesses and individuals to make and use reproductions of music. Digital copies have the fundamental advantage over analogue copies of not degrading in quality, with the digital copy perfectly replicating the original from which it was made. As a result, the benefit users derive from making reproductions has greatly increased.

9. Significant progress toward the government's goal of "modernizing" copyright law was in fact made in 1997 when the *Copyright Act* was last amended. These 1997 legislative reforms reinforced the landmark 1990 Supreme Court ruling in *Bishop v Stevens*[1], which confirmed that the performance or communication right does not include, and is separate and distinct from, the reproduction right. The amendments made at that time strengthened the existing framework in which authors and publishers of musical works, as well as performers and makers of sound recordings, could generate revenue from modern uses of their exclusive reproduction right. The result has been increased royalties following agreements with users and various decisions by the Copyright Board of Canada, as shown in Table 1.

TABLE 1
Royalties collected by CSI, CMRRA and SODRAC, 2000-01 and 2009-10 for distribution to authors and publishers

	2000-01	% of Royalties	2009-10	% of Royalties
Mechanical Licensing (CDs, DVDs)	$53,829,186	97.8%	$32,119,015	41.9%
Licensing of Online Music Services (iTunes, etc.)			$9,686,348	12.6%
Private Copying Levy			**$17,262,190**	**22.5%**
Broadcast Mechanical: Commercial Radio			**$8,968,045**	**11.7%**
Broadcast Mechanical: Commercial TV	**$707,990**	**1.3%**	**$2,229,595**	**2.9%**
Broadcast Mechanical: CBC/Pay Audio/Satellite Radio/Non-commercial Radio	**$520,000**	**0.9%**	**$6,400,926**	**8.3%**
Total Domestic Royalties	$55,057,176	100.0%	$76,666,119	100.0%

Source: CMRRA, SODRAC and CSI.

10. The data shown in Table 1 illustrate the critical importance of broadcast mechanical and private copying revenues over the last 10 years, a time of serious crisis for the music industry. Among other things:

    - 10 years ago, in 2000-01, $53.8 million in royalties – fully 98% of the total amounts collected by CMRRA and SODRAC – were accounted for by licensing the reproduction of musical works on audio cassettes, CDs and other physical media (known commonly as "mechanical licensing").
    - By 2009-10, the shrinking market for CDs had caused mechanical licensing royalties to decline by 40%, to $32.1 million, representing only 42% of total royalties.
    - To some degree, the sale of electronic music downloads online has offset declining royalties from mechanical licensing. However, the revenue from licensing online music services is far from compensating for the decline in mechanical licensing.
    - If CSI had received only mechanical and online licensing royalties, the total collected in 2009-10 would have been 22% lower than the royalties received from mechanical licensing alone in 2000-01, without taking account of inflation.
    - That decline has been offset primarily by royalties from the private copying levy and expanded licensing of the reproduction right to broadcasters.
    - **In 2009-10, private copying and the broadcast mechanical right accounted for $34.9 million of the royalties CSI collected for authors and publishers from licensing on their behalf the reproduction right in musical works. This represented 45% of the total royalties CSI collected, with about half coming from private copying and half from broadcast mechanical licensing.**

11. If Bill C-32 passes in its present form, these royalties will initially be greatly reduced. Over a relatively short period, they will be eliminated entirely. **Bill C-32 would thus**

reverse licensing arrangements in place since 1990 and important aspects of Canada's copyright law that were strengthened in 1997. It would have a devastating effect on the ability of music creators to generate revenue from a variety of modern uses of their exclusive reproduction right.

12. As technology continues to change and the operating practices of existing and new services develop further, the impact of the proposed revisions will increase. The benefit derived from reproducing musical works in the context of growing technological sophistication will continue to increase, while rights holders will be prevented from receiving a fair share of the increased value.

PROPOSED REVISION OF SECTION 30.9: EPHEMERAL RECORDINGS – BROADCASTING UNDERTAKING

The amendments proposed

13. The most important change proposed in section 34 of the Bill is to repeal the existing subsection 30.9(6) of the *Copyright Act*, which provides that there is no exception for "ephemeral" recordings where a licence is available from a collective society. Without this limitation to the exception, broadcasters would have enjoyed the benefit of the ephemeral exception introduced in 1997 even if a licence from a collective society was available. CSI's ability to propose tariffs and to negotiate licences covering the reproductions made by broadcasters would have been fundamentally compromised.

14. In conjunction with that change, Bill C-32 would amend subsection 30.9 (1), which defines the scope of the exception. Currently, subsection 30.9 (1) permits the reproduction of a sound recording, a performers' performance or a musical work "for the purpose of transferring it to a format appropriate for broadcasting". Bill C 32 would replace this "transfer of format" exception with a full-scale broadcast exception, permitting broadcasters to make an unlimited number of reproductions as long as they were made "**for the purpose of their broadcasting**". While this change might seem innocuous on the surface, the reality is that it would create a much broader exception that would cause severe damage to the interests of rights holders.

15. The existing exception, adopted in 1997, permits broadcasters to reproduce the content of a CD on their hard drive, provided that other statutory conditions are met. It does not permit them to make as many copies of the reproduction on their hard drives or servers as are useful for their broadcasting purposes. That would change, with the proposed amendment permitting an unlimited number of copies to be made, as long as they were made for broadcasting purposes.

16. The exception is then subject to a number of limitations. First, the existing subsection 30.9(1)(a) requires that the broadcaster own an authorized copy of the sound recording, or of the performer's performance or musical work embodied in a sound recording that is being transferred onto its hard drive. The practical impact is to require that the broadcaster own a CD containing each work copied onto its hard drive. Bill C-32 would

replace that provision with an expanded subsection 30.9(1)(a) which would require either that the broadcaster own a copy of the sound recording, or of the performer's performance or musical work embodied in a sound recording or that it have a licence to use the copy. This change would accommodate the reality that broadcasters now rarely copy CDs onto their hard drive, instead receiving as a digital download the source copy from which they typically make multiple copies for their programming and broadcasting purposes.

17. Finally, Bill C-32 would amend subsection 30.9(4), which sets out conditions where the destruction of reproductions made by the broadcaster would be required. The amendment proposed would make this provision consistent with the proposed revision to 30.9(1)(a), requiring that copies be destroyed either when the broadcaster no longer owns an authorized copy or when its licence to use the copy expires. This subsection now includes, and would continue to include, the requirement that copies be destroyed **"at the latest within 30 days after making the reproduction, unless the copyright owner authorizes the reproduction to be retained."**

The impact of the proposed amendments

18. The situation that would be created if the revisions to subsection 30.9 were passed as drafted can be easily summarized. All copies that broadcasters made for their broadcasting purposes could potentially be covered by the exception. This would be true even if a licence were available from a collective society, as long as the other requirements were met. The specific requirement that might at first appear to create problems relates to the length of time reproductions could be retained.

19. To better understand the practical impact of the proposed amendment, CSI commissioned a report by Professor Michael Murphy[ii], a recognized expert on the reproduction practices of radio and television broadcasters. Professor Murphy has provided expert reports on contemporary radio and television technology for use in proceedings before the Copyright Board.[iii]

20. CSI wished to determine whether Canadian broadcasters could potentially comply with the technical requirement to destroy reproductions within 30 days, without ever losing access to the content of their digital libraries or being hindered in their ability to use the recorded musical works they had reproduced.

21. In the Executive Summary to his report, Professor Murphy summarizes his conclusions as follows:

> ... Canadian broadcasters could indeed comply with the technical requirement of Bill C-32 subsection 30.9 (4) that they destroy all reproductions within the 30 day period prescribed in the Bill. [...] Radio and television stations make use of many reproductions that are either erased before 30 days, or they can easily modify processes to ensure that they are erased within this time limit. For digital copies that are presently retained for greater than 30 days, technical and procedural options are available that could allow broadcasters to "recreate" or refresh their libraries of musical works

every 30 days and thus comply with the 30 day provision for these types of copies as well. As a result, each type of copy of a musical work that is made for broadcasting purposes would remain a so-called ephemeral copy. However, by making copies of copies, the broadcaster would have the use of the work for as long as it was beneficial to the broadcaster. The changes necessary to meet the 30 day requirement involve little to no additional cost to implement and would be applicable for both radio and television operations. The changes required will only become more viable in the future as bandwidth speeds increase and digital technology continues to increase in capacity and decrease in cost.

22. This analysis confirms that the issue raised by the proposed amendment is not whether broadcasters should benefit from an exception for ephemeral reproductions, but whether they should be completely exempt from the requirement that they pay to reproduce musical works. **The combination of technological change and the proposed amendments would convert an exception intended only for ephemeral recordings into a complete exception for the many valuable recordings made by broadcasters in the course of their operations.**

Background

23. The provisions currently in the legislation were implemented in 1997. In justifying their request for an exception in 1996, a key element of the CAB Radio Board argument was that there was no practical way they could clear the rights required in order to reproduce musical works. The Executive Summary of the CAB Radio Board's September 3, 1996 submission to the committee reviewing the proposed legislation expressed the concern that "radio stations will be held to ransom because in many cases, obtaining appropriate clearances for music will be prohibitively expensive or even impossible". Experience, however, has proven the CAB wrong.

24. Any concern over the administrative problem in clearing rights was addressed effectively in the legislation passed in 1997. An exception was granted, but it would only apply if a licence was not available from a collective society. Where a blanket licence is available there is no difficulty in obtaining the necessary licences to a vast repertoire.

Reproduction rights payments by commercial radio broadcasters are fair and reasonable

25. As for the CAB's frequently-expressed concern about prohibitively expensive costs for a licence to reproduce musical works, this issue is fully addressed by the ability to take any dispute about the value of the reproduction right before the Copyright Board. This ability exists both for the collectives and for the broadcasters, with either being able to take concerns regarding the royalty rate to the Copyright Board. The Board in turn is required, under the *Copyright Act*, to hear expert evidence and argument from all interested parties and to establish rates that are fair and reasonable.

26. Commercial radio broadcasters have been making payments for the reproduction of works since 2001. The rates the Copyright Board has set for the reproduction right are

very far from being "prohibitively expensive", as the CAB claimed they would be in 1996. The annual rates set for the period 2008 to 2012 would represent payments to CSI by commercial radio stations of about $11 million. This represents only 0.7% of the $1.5 billion in annual revenue of commercial radio stations.

27. The existing requirement to pay for the reproduction right applies as well to performers' performances and to sound recordings of music. The Copyright Board set the royalty rates applicable to commercial radio stations for these rights at a level that will result in a payment of about $10 million annually, a little less than 0.7% of the stations' annual revenue.

28. **By forcing rights holders in recorded music to permit broadcasters to reproduce music without paying them, the commercial radio industry would thus save approximately 1.4% of its revenues.** These payments reflect all claims for payment that can be made for the right to reproduce recorded music.

The value of the reproductions made by broadcasters

29. In its 2009 submission to the government's copyright consultation process, the CAB made the following arguments in support of its request to be allowed to make and use reproductions of recorded music without payment:

- recordings are made only to facilitate broadcasting or transmitting content;
- the reproductions are temporary, technical and incidental;
- the reproductions have no commercial value; and
- making such reproductions does no harm to music creators.[iv]

There is no merit to any of these claims.

30. Whether the reproductions will facilitate broadcast and might be in some instances temporary while permanent in other cases, of a technical nature or incidental to broadcasting, has been considered by the Copyright Board. The Board found that these reproductions have value.

31. After considering all the evidence presented during the recent reconsideration of the proposed commercial radio tariffs, the Copyright Board reiterated its 2003 conclusion concerning the benefits broadcasters derive from reproducing musical works. The 2010 Decision[v] summarizes the Board's position as follows:

> In CSI Commercial Radio (2003), the Board found that new broadcasting technology meant lower costs for radio stations and that music reproduction on a hard drive allowed stations to optimize their broadcasting efficiencies. The evidence presented on both sides in this instance confirms that ***reproduction technologies allow stations to increase their efficiency and profitability***. (Page 70, para. 222, emphasis added)

Total music royalties paid by commercial radio broadcasters

32. Commercial radio broadcasters have in the past sought to make their case based on the financial damage they would suffer if they were not granted an exception. During the 1996 review of the amendments then proposed to *the Copyright Act*, the CAB Radio Board stated that it was "deeply concerned" that the proposed amendments would hurt local radio programming, place Canadian radio stations at a competitive disadvantage with their American counterparts and hinder the move to new technology by the radio industry.

33. The Executive Summary of the CAB Radio Board's submission to the House of Commons committee reviewing the legislation in 1996 stated that, "after 15 years of losses or marginal profits, the radio industry has already cut expenses to the bone."[vi] It further claimed that "these new expenses cannot be passed on to advertisers."[vii] More recently, in its 2009 submission to the government's copyright consultation of the government, the CAB stated that radio faced potential music copyright payments of $220 million a year.[viii]

34. It should first be noted that commercial radio stations depend on recorded music for the vast majority of their program content. In 2005, research presented to the Copyright Board indicated that music accounted for 76% of the program content of the vast majority of commercial radio stations (i.e. stations other than talk radio stations).[ix] More recently, in its 2010 Decision on the commercial radio tariffs of collectives that represent the music rights of *all* potential royalty claimants, the Board reported that the research of both the collectives and the broadcasters indicated that reliance on music by commercial radio stations that broadcast in a music format had increased by a further 6%, taking such reliance to 80%.[x]

35. Commercial radio broadcasters have complained that the current copyright regime, which recognizes the separate communication and reproduction rights of authors, performers and makers of sound recordings, is leading to a mounting number of new copyright payments. In fact, the total payments made for the music content that constitutes the vast majority of programming on commercial radio stations was calculated by the Copyright Board as $85 million, rather than the $220 million figure used by the CAB in the 2009 reference noted above. This payment for its music content represented just 5.7% of the total revenue of the commercial radio industry.

36. From these two figures emerges the striking fact that **commercial radio stations pay just 5.7% of their total revenue for 80% of their program content.** Judged by any reasonable business standard, this level of payment can hardly be considered to be excessive.

37. In the hearing on CSI's first commercial radio tariff, the Copyright Board considered evidence from both parties concerning the ability of broadcasters to pay the proposed tariff. It came to the following conclusion in its March 2003 Decision.[xi]

> The Board has always acknowledged that a fair tariff must take into account the ability of users to pay. In this instance, the Board believes that the

commercial radio industry has the means to pay the certified tariff even though the transition to digital audio broadcasting will require a considerable outlay by broadcasters. This case clearly establishes that the radio industry as a whole is very profitable and that setting a tariff even double what the Board is certifying would have a limited impact on the industry's bottom line. (Page 18)

38. The issue was not revisited in the most recent hearing for all of the proposed commercial radio tariffs. Notwithstanding the increase in tariffs facing commercial radio stations at that point, the CAB informed the Copyright Board that the industry's ability to pay would not be an issue for them in the proceeding.

Financial trends in commercial radio

39. With respect to the commercial radio industry's revenues and profits, it is quite obvious that the industry reached and sustained a very high level following passage of the 1997 legislation. All of the amendments to which CAB's radio members objected were implemented in the 1997 revision of the *Copyright Act*. Since that time, however, both the advertising revenues and the profits of radio broadcasters have increased dramatically. Even in 2009, in the context of the major economic downturn, the commercial radio industry earned a pre-tax profit margin of 21.4%.

TABLE 2
Commercial Radio Industry Revenue and Pre-tax Profit, 1996-2009

YEAR	TOTAL REVENUE ($millions)	PRE-TAX PROFIT ($millions)	PRE-TAX PROFIT MARGIN (%)
1996	814.2	8.2	**1.01**
1997	868.8	50.8	**5.85**
1998	940.1	80.0	**8.51**
1999	973.8	88.9	**9.13**
2000	1,023.4	111.1	**10.86**
2001	1,069.6	95.5	**8.93**
2002	1,102.7	160.9	**14.59**
2003	1,189.6	209.9	**17.64**
2004	1,226.2	205.2	**16.74**
2005	1,342.4	255.6	**19.00**
2006	1,418.7	298.4	**21.00**
2007	1,502.7	306.5	**20.40**
2008	1,590.8	388.7	**24.40**
2009	1,507.6	319.4	**21.20**

Source: CRTC, Statistical and Financial Summaries, Radio, 1996-2000, 2001-2005 and 2005-2009.

Reproduction rights in other countries

40. The CAB's submission to the government's 2009 copyright consultations claimed that the type of broadcast exception sought by the CAB has been adopted by a large number of Canada's significant trading partners, although it acknowledged that the exceptions incorporated varying limitations.[xii] More recently, following the Copyright Board's decision on the royalties that must be paid by commercial radio stations to use music, a spokesman for several private broadcasting companies – the CAB had closed its operations by that date – said that "most other industrialized countries don't require broadcasters to pay for reproduction rights."[xiii]

41. Appendix A to the CAB's 2009 brief dealt with 18 countries selected by the CAB. The CAB acknowledged that five of those countries, including France, Greece, Switzerland, Belgium and Austria provided no exception for broadcasters.

42. However, it would be a mistake to think that the remaining 13 countries, one of which was Canada, enjoyed an exception of the kind advocated by the CAB and proposed in Bill C-32. On the contrary, international comparisons provide no evidence of any established pattern of providing for an exception such as is proposed in Bill C-32, nor do they support the claim that in most countries broadcasters do not pay for the right to reproduce musical works. The degree of variations that exist among the countries selected by the CAB is evident in the following examples.

The United States

43. The exception that exists in American law is far narrower than the exception proposed in Bill C-32. CSI commissioned an expert report on the scope of the U.S. exception from Professor Ralph Oman. Mr. Oman was Register of Copyrights in the United States from 1985 to 1993, and as such the chief government official responsible for the administration of the U.S. copyright system. A copy of his report is attached as Appendix B.

44. The principal conclusions of his report include the following:
    - U.S. broadcasters are allowed to make only a single, temporary copy of a "transmission program" that includes musical works, with the copyright owner's authorization and payment required for making additional copies;
    - a "transmission program" is "a body of material that, as an aggregate, has been produced for the sole purpose of transmission to the public in sequence and as a unit."; and
    - the exception does not give broadcasters the right to reproduce individual musical works or to build and maintain a digital library of musical works.

The United Kingdom and the Netherlands

45. In the United Kingdom, PRS for Music, the collective society that represents both the performance and the reproduction right, reports that broadcasters made total payments

for the two rights in 2009 of just over £160 million, of which £50.5 million was attributed to the value of the reproduction right.

46. Similarly, in the Netherlands, the collective society Buma/Stemra reports that it collects at a combined royalty rate of 13.33%, with 10% attributed to the performance right and 3.33% to the reproduction right where 100% of the content is music, and with pro rata reductions to reflect the percentage of music content. These rates are substantially higher than the corresponding rates in Canada.

Germany and Spain

47. In Germany and Spain, the exception permits the making of a reproduction for a single broadcast only. Although not included in the CAB's list, within North America, the same limitation applies in Mexico. In all three countries broadcasters pay for the right to reproduce musical works.

Proposed amendment to section 30.9 of Bill C-32

48. **The amendments proposed to subsections 30.9(1) and 30.9(4) are reasonable only if subsection 30.9(6) remains in the *Act*.** In that case, the amendments would permit broadcasters to make and use reproductions for the purpose of their broadcasting if they could not obtain a licence from a collective society with respect to the work or works in question, thus preserving the balance that was struck in the 1997 amendments.

49. Therefore, CSI submits that section 34 of Bill C 32 should be amended as follows:

> **34. (1) The portion of subsection 30.9(1) of the *Act* before paragraph (*b*) is replaced by the following:**
>
> **30.9** (1) It is not an infringement of copyright for a broadcasting undertaking to reproduce in accordance with this section a sound recording, or a performer's performance or work that is embodied in a sound recording, solely for the purpose of their broadcasting, if the undertaking
> (*a*) owns the copy of the sound recording, performer's performance or work and that copy is authorized by the owner of the copyright, or has a licence to use the copy;
>
> **(2) Subsection 30.9(4) of the *Act* is replaced by the following:**
>
> (4) The broadcasting undertaking must destroy the reproduction when it no longer possesses the sound recording, or performer's performance or work embodied in the sound recording, or its licence to use the sound recording, performer's performance or work expires, or at the latest within 30 days after making the reproduction, unless the copyright owner authorizes the reproduction to be retained.
>
> ~~**(3) Subsection 30.9(6) of the *Act* is repealed.**~~

50. If subsection 30.9(6) were to be repealed, major changes to subsections 30.9(1) would be necessary to substantially limit the scope of any reproductions permitted. Without such changes, the Bill would have the effect of substantially reducing – or eliminating altogether – a critical source of revenue for songwriters and music publishers.

TEMPORARY REPRODUCTIONS FOR TECHNOLOGICAL PROCESSES [SECTION 30.71]

Reproduction rights in the digital era

51. Reproduction rights continue to be exercised in the digital domain just as they are in the analogue domain. The modernization of the *Copyright Act* **should not call the exercise of the reproduction right into question.** Reproduction rights remain a key component of the *Copyright Act* and are exclusive to the rightsholders, whose entitlement to exercise these rights with respect to their own works is both fundamental and key to their livelihood.[xiv]

52. Copies of works and recordings made in the digital domain, whether via the Internet, a server or a digital recording device, all have a **useful, specific and distinct** function. Such reproductions should be authorized by the rightsholder by applying a **range of economic values** based on their utility and effectiveness for the individuals carrying out these reproductions.

53. **The onset of the digital era did not revolutionize how reproduction rights are exercised by a work's authors, who should continue to have the exclusive right to exercise them.**

Value of reproduction rights

54. Thus far, determining the economic value of reproduction rights has been problem-free. This is because, over the years, the value of various types of reproductions has been determined in Canada under a system of free negotiations involving music users and collective management societies, which represent the interests of rightsholders.

55. Economic value has also been determined by the Copyright Board of Canada, an independent administrative agency with jurisdiction in economic regulation. The Copyright Board undertakes a quasi-judicial process under which users and rightsholders each present their case, including consideration of a user's ability to pay proposed royalties. This process provides a way to evaluate the various relevant technological processes and to determine the royalties payable for reproducing protected works.

56. Through voluntary negotiations, as well as various Copyright Board decisions, **different values have been established based on the type of reproduction involved, ranging from buffer memory (lower value) to permanent copies (higher value).**

57. In short, Canada already has an established series of benchmarks used to define what is a temporary or transitory copy and to evaluate and distinguish between copies with higher and lower economic value. Consequently, section 30.71 serves no useful or necessary function in Bill C-32. There is no need for Parliament to intervene.

58. **Consequently, CSI submits that the new section 30.71 should be withdrawn and that the value of the reproduction right should continue to be determined through free negotiations or through a fair, open process before the Copyright Board.**

Proposed amendment to section 30.71 of Bill C-32

59. However, if the government insists on including this section, its wording should be modified to avoid certain devastating negative effects. In its current form, this section could even eliminate entire sections of the legitimate field of practice in which rightsholders currently exercise reproduction rights in the digital domain.

Purpose of amending this section

60. The proposed wording is not precise. Its extremely broad scope will no doubt give rise to a range of interpretations, which will in turn give rise to an even wider range of challenges by users claiming that their activities (regardless of the value of the reproductions involved) are henceforth covered by this new exception. The notion of "facilitating use" is vague, subjective and does not take into account the economic benefits derived by users.[xv] This unwanted negative effect should be avoided. Digital reproductions should retain their value because, if they stem from improved processes that are more affordable and inherently innovative, users are certain to benefit from them.

Principles and scope of the proposed legislation

61. The government's intentions, as indicated in the data sheets made available to the public, appear to be to target activities such as reformatting Web pages for display on smart phones or purely technical processes such as cache memory transmission on the Internet. In accordance with this vision, and to avoid legal uncertainties, this section should specify that the reproduction has no significant economic value. The government's intent cannot be to exempt from the protection of the *Act* reproductions that have economic value resulting in tangible benefits to users and for which copyright holders should be entitled to continue to receive royalties.

62. In addition, the government's stated policy would be achieved by establishing clearly that of the duration of the period during which the reproduction is kept should be clearly established as being no more than transitory.[xvi] Failing to clarify this distinction will only lead to a flood of litigation stemming from this section.

63. Moreover, if it turned out that the exception described in section 30.71 covered more than transitory reproductions or reproductions that have significant economic value, this would have an adverse effect on the normal exploitation of the work and the compensation owed to rights holders for its use. This would be a clear violation of Canada's international treaty obligations, which cannot be the government's intent.

64. As drafted, the exception would also appear to apply to reproductions made by programming undertakings and broadcasting undertakings, each as defined in the *Act*,

and therefore overlap confusingly with the separate exceptions already granted to those entities by sections 30.8 and 30.9, respectively.

65. Therefore, if proposed section 30.71 is to be adopted, CSI recommends that it be amended as follows:

> **Temporary reproductions**
>
> 30.71 It is not an infringement of copyright to make a reproduction of a work or other subject-matter if:
>
> (a) the reproduction forms an essential part of a technological process;
>
> (b) the reproduction's only purpose is to facilitate a use that is not an infringement of copyright, and the reproduction itself has no significant economic value; and
>
> (c) the reproduction exists only for ~~the duration of the technological process~~ a transitory period.
>
> For greater certainty, this section does not apply to reproductions made by or under the authority of a "programming undertaking," as that term is defined in subsection 30.8(11), or a "broadcasting undertaking," as that term is defined in subsection 30.9(7).

66. **CSI believes that these amendments provide a more accurate reflection of the government's intentions since they clarify various broad and vague notions while complying with the Bill's scope and principles. For that reason, if proposed section 30.71 is to become law, it is imperative that these amendments be incorporated in order to ensure a fair and balanced common-sense approach.**

BACKUP COPIES [SECTION 29.24]

67. Proposed section 29.24 stipulates that it is not an infringement of copyright for a person who owns, or has a licence to use, a copy of a work or other subject matter to reproduce that copy solely for backup purposes, provided that the source copy is not an infringing copy, that the person does not circumvent a TPM in order to make the backup copies, and that the backup copies are not given away. If the person ceases to own or have a licence to use the source copy, all existing backup copies must be destroyed immediately.

68. As a preliminary matter, it is important to note that the proposed exception would apply not only to individuals but also to any business or other organization that makes backup copies for any purpose. As a result of its broad application, the exception appears to conflict with other provisions of the *Act* and to have other unintended consequences.

The proposed exception would expropriate remuneration currently paid to rightsholders under Part VIII of the *Copyright Act*

69. To the extent that it permits individuals to make backup copies of musical works, performers' performances and sound recordings, the proposed exception would overlap and conflict with Part VIII of the *Act*, which already permits the making of such copies but requires that rightsholders receive remuneration for them. The proposed new exception, by contrast, would explicitly permit the making of a potentially substantial number of copies without any remuneration at all. This would interfere with a substantial existing revenue stream for rightsholders, violating the Berne three-step test.

70. Even if this conflict were addressed, the economic value of the private copying levy will inevitably continue to decline as long as it is limited to recording media that are increasingly obsolete. Consequently, in a short time, the making of multiple backup copies by individuals will become just another form of uncompensated use.

The proposed exception would disrupt other existing licensing schemes, further depriving rightsholders of compensation

71. In some cases, the making of backup copies is governed by contract – such as, for example, in the case of music downloads acquired from online music services such as iTunes. The proposed exception appears to override such contractual provisions, which form an essential term of the economic bargain by which users are given access to these products.

72. In many other cases – particularly those involving users other than individuals – the backup copies contemplated by the proposed exception are already licensed under the provisions of existing licensing schemes or tariffs, including those administered by CSI, SODRAC and CMRRA. The backup copies of musical works made by broadcasters to fulfill various broadcast-related functions are subject to licences negotiated with, for example, pay audio, non-commercial radio, and television broadcasters, as well as to CSI's Commercial Radio Tariff and Satellite Radio Services Tariff. In such cases, the remuneration payable to the collectives reflects the value of all of the copies made for broadcast purposes, including backup copies.

One backup copy is enough

73. Unlike existing subsection 30.6(b) of the *Act*, which permits the making of a single backup copy of a computer program, the proposed exception provides for no limitation on the number of reproductions that may be made for backup purposes. In fact, the language of paragraph 29.24(1)(d) expressly contemplates the making of multiple reproductions. CSI believes that, consistent with existing subsection 30.6(b), only a single copy for backup purposes should be permitted.

The conditions designed for the protection of rightsholders are inconsistent and unenforceable

74. The conditions applicable to the exception, while logical, are essentially unenforceable. In practice, it would be all but impossible for rightsholders to know which copies are made solely for backup purposes, much less whether any of the copies are given away or whether all such copies are destroyed when the person who made them no longer enjoys

rights to the source copy. The exception may therefore serve to legalize virtually any copies a user has made.

75. The requirement that the person who makes the backup copies not "give any of the reproductions away" is worded curiously, in that it may not prohibit the sale, rental or other distribution of the reproductions.

Achieving an appropriate balance

76. CSI recognizes that it is appropriate in some circumstances to permit the making of backup copies for various purposes, and that it may not be necessary to compensate rightsholders for every such copy, however it may be made or used. However, it is never necessary to provide for uncompensated backup copies where the making of such copies is already covered by a contract, licence, tariff or existing statutory scheme. CSI believes that the wording of the proposed exception is much broader than necessary and will interfere unjustifiably with the normal exploitation of works and other subject-matter.

77. To ensure that the scope of the exception is limited appropriately, CSI suggests that it be amended as follows:

Backup copies

(1) It is not an infringement of copyright in a work or other subject-matter for a person who owns – or has a licence to use – a copy of the work or subject-matter (in this section referred to as the "source copy") to ~~reproduce~~ make a single reproduction of the source copy if

(a) the person does so solely for backup purposes in case the source copy is lost, damaged or otherwise rendered unusable, other than by the deliberate act of the person who made the reproduction;

(b) the source copy is not an infringing copy;

(c) where the person has a licence to use the source copy, the licence does not prohibit the making of backup copies and the person complies with all other material conditions of the licence;

(~~c~~d) the person, in order to make the reproduction, did not circumvent, as defined in section 41, a technological protection measure, as defined in that section, or cause one to be circumvented; and

(~~d~~e) the person does not ~~give any of the reproductions away~~ sell, distribute, rent out or give the reproduction away.

Backup copy becomes source copy

(2) If the source copy is lost, damaged or otherwise rendered unusable, other than by the deliberate act of the person who made the reproduction under subsection (1), ~~one of the reproductions~~ the reproduction made under subsection (1) becomes the source copy.

Destruction

(3) The person shall immediately destroy all reproductions made under subsection (1) after the person ceases to own, or to have a licence to use, the source copy.

Application

(4) This section does not apply to reproductions that are subject to section 30.71 or to Part VIII, or that are made by or under the authority of an "intermediary," as that term is defined in subsection 29.21, a "programming undertaking," as that term is defined in subsection 30.8(11), or a "broadcasting undertaking," as that term is defined in subsection 30.9(7).

Reproductions subject to licence, contract or tariff

(5) If the person is bound by a licence or other contract that governs the extent to which the individual may reproduce the source copy for the purposes set out in subsection (1), or if the reproduction of the source copy is subject to the terms of an approved tariff, the licence, contract or tariff prevails over subsection (1) to the extent of any inconsistency between them.

NOTE: ***If section 30.71 is withdrawn, as requested in this brief, the reference to this section in the proposed amendment at subsection 29.24(4) above is unnecessary.***

FIXING SIGNALS AND RECORDING PROGRAMS FOR LATER LISTENING OR VIEWING [SECTION 29.23]

78. Proposed section 29.23 would create another uncompensated exception, this time for so-called "time shifting," i.e., the recording of broadcast programs for later listening or viewing. Unlike the equivalent provision of Bill C-61, which was limited to programs transmitted via conventional broadcast – that is, by broadcasters licensed by the CRTC – Bill C-32 would extend the exception as well to programs transmitted only via the Internet.

79. This expansion is presumably intended to achieve technological neutrality. However, its practical implications for the rightsholders represented by CMRRA and SODRAC through CSI are far from neutral: combined with the use of the broad term, "program," which is not defined, the effect seems to be that the reproduction of certain audio webcasts, which is in many cases licensed by CSI, is now exempted. Similarly, it would appear that the exception would apply to programs transmitted by satellite radio services, even though the making of copies of those programs for time-shifting purposes is already licensed by CSI through the *CSI Satellite Radio Tariff*, certified by the Copyright Board in 2009

80. Although the exception requires the reproductions to be retained no longer than reasonably necessary in order to listen to or view the program at a more convenient time, the enforceability of that restriction is questionable at best. Part VIII of the *Act* was introduced partially as an acknowledgement that it was impossible in practice to detect or prevent the private home copying of music for personal use, and the same is equally true of time-shifting. The likely outcome is that people will feel free to create and store extensive digital libraries of an increased variety of audio and audiovisual programming, which will necessarily lead to a reduced demand for paid copies of the same works.

81. CSI assumes that the purpose of the proposed exception is to legalize the very common practice of recording broadcast programs for later enjoyment, such that users of VCRs and personal video recorders will no longer be committing acts of copyright infringement. That is sound and sensible policy. However, by implementing it, the government should not inadvertently legitimize practices that are less common and for which rightsholders are entitled to be compensated. In order to avoid these unintended consequences, CSI proposes the following amendments to proposed section 29.23:

- To ensure that time-shifting copies are used only for the personal enjoyment of those who make them, and not shared with others, revise paragraph 29.23(1)(e) to prohibit the sale, rental or other distribution of the copies – rather than merely "[giving] them away" – and revise paragraph 29.23(1)(f) to require that the copies be used only for the "private use" of those who make them (and not for "private purposes," which may be capable of a broader interpretation).

- Expand the limitation in subsection 29.23(2) to exclude programs transmitted by "subscription services," as defined in a proposed revision to subsection 29.23(3), not just by on-demand services. This will ensure that programs broadcast by satellite radio services and subscription-based online music services are not inadvertently included within the scope of the exception.

- Revise the definition of "program" to ensure that it does not apply to single works, which would create a serious risk of eroding the market for digital downloads of musical and audiovisual works. The proposed definition is based closely on the definition of the same term in the *Broadcasting Act*. Consequential revisions to the proposed definitions of "broadcast" and "on-demand service" would also be required in order to achieve the suggested limitation.

82. The specific amendments proposed are as follows:

> 29.23 (1) It is not an infringement of copyright for an individual to fix a communication signal, to reproduce a work or sound recording that is being broadcast or to fix or reproduce a performer's performance that is being broadcast, in order to record a program for the purpose of listening to or viewing it later, if
>
> (*a*) the individual receives the program legally;
>
> (*b*) the individual, in order to record the program, did not circumvent, as defined in section 41, a technological protection measure, as defined in that section, or cause one to be circumvented;
>
> (*c*) the individual makes no more than one recording of the program;
>
> (*d*) the individual keeps the recording no longer than is reasonably necessary in order to listen to or view the program at a more convenient time;
>
> (*e*) the individual does not sell, distribute, rent out or give the recording away; and
>
> (*f*) the recording is used only for ~~private purposes~~ the individual's own private use.

Limitation

(2) Subsection (1) does not apply if the individual receives the work, performer's performance or sound recording under an on-demand service or a subscription service.

Definitions

(3) The following definitions apply in this section.

"broadcast" means any transmission of a ~~work or other subject-matter~~ program by telecommunication for reception by the public, but does not include a transmission that is made solely for performance in public.

"on-demand service" means a service that allows a person to receive works, ~~performer's~~ performers' performances and sound recordings, or programs containing works, performers' performers and sound recordings, at times of their choosing.

"program" means sounds or visual images, or a combination of sounds and visual images, containing more than one work or other subject-matter.

"subscription service" means a service that allows a person to receive programs for a fee or for other valuable consideration, including on a free trial or other promotional basis.

NON-COMMERCIAL USER-GENERATED CONTENT [SECTION 29.21]

83. Proposed section 29.21 of Bill C-32 would introduce a new exception to copyright infringement for "non-commercial user generated content" ("UGC"). Under the exception, individuals would be permitted to use existing works and other subject-matter in the creation of new works or other subject-matter – and to use, or authorize an "intermediary" to disseminate, the resulting UGC – provided that the use of the UGC, or the authorization to disseminate it, is solely for non-commercial purposes, and provided that certain other specified conditions are met. The exception would apply to all works, provided that they have been published or otherwise made available to the public, and would allows dissemination of the UGC online and elsewhere.

84. On the basis of the government's backgrounders and other public statements, CSI understands that the proposed exception is intended primarily to enable individuals to create mash-ups, remixes, and other familiar forms of UGC, built upon the existing work of others. However, CSI is greatly concerned about the open-endedness of the provision as drafted and its potential unintended consequences. Perhaps more importantly, CSI notes that there is no international precedent for such an exception and that, in fact, the exception would disrupt or eliminate significant actual and potential revenue streams for rightsholders.

The proposed exception would permit widespread trafficking in UGC without compensation, expropriating the rights of creators and rightsholders

85. It appears from the language of proposed subsection 29.21 that the requirement that the use or dissemination of the UGC be solely for "non-commercial" purposes is limited to

the creator of the new work. It does not extend to the website hosting the content or any other intermediary who is authorized to disseminate the new work. In practice, this means that, as long as the author of the newly-created UGC does not profit from its dissemination, commercial "intermediaries" like YouTube will be entitled to continue to build profitable business models by distributing UGC that contains works and other subject-matter for which no rightsholders have been paid. It could also allow third parties to sell copies of UGC produced under the exception with no obligation to obtain licences, or to compensate rightsholders, for the use of the underlying works.

86. This contrasts sharply with the current situation, in which YouTube and other similar businesses are required to enter into licensing arrangements with rightsholders for the dissemination of content – regardless of its origin – and do so regularly in the United States and Europe. (In fact, it may well be that some of those licensing arrangements already include Canada.) It also effectively forecloses an important potential market for the exploitation of musical works in Canada, one which CSI would otherwise pursue through collective licensing in order to maximize user access to musical works while ensuring fair compensation for rightsholders.

87. However, since the exception applies unless an objecting rightsholder can establish that *each individual instance* of use would have a "substantial adverse effect" on the exploitation or potential exploitation of a particular work – a virtually unachievable standard in most cases – it is by no means clear that foreclosing the possibility of licensing the use and dissemination of existing works in UGC would affect the availability of the exception. What proposed section 29.21 fails to acknowledge is that **the widespread use of content in this manner is all but <u>certain</u> to have a substantial adverse effect on the overall market for the exploitation of all works.**

88. In addition, it is unclear precisely what "non-commercial" is intended to mean and how far it extends in terms of the types of uses to be made. At various points in Bill C-32, references are made to "personal use" (which already appears in the *Copyright Act*) and "private purposes" in addition to the "non-commercial use" contemplated by section 29.21 and other provisions. Comparing the plain language of those competing terms suggests that "non-commercial use" is, at the very least, broader than the others – in other words, that one can use a work or other subject-matter in ways that, while "non-commercial" in nature, are neither personal nor private. Certainly, it would appear to include uses by not-for-profit organizations, as well as non-profit uses even within for-profit undertakings.

The proposed exception would have other significant unintended consequences

89. Although it has generally been assumed that the proposed exception is intended to apply only to the online dissemination of digital content, it is not at all clear that subsection 29.21(1) is in fact limited in this way. As drafted, the exception would also apply to physical copies of UGC. This means that the exception would apply to remixes and mash-ups distributed on CD and in other physical formats. It could also mean that CD compilations containing recordings by various artists would fall within the exception so long as the CDs are not sold for commercial purposes – particularly since the exception places no limit on the amount of a work that may be reproduced in the creation of a new

work, conceivably meaning that **a new work of UGC could include one or more entire works and still qualify for the exception.**

90. Both CMRRA and SODRAC are currently engaged in the active licensing of musical works for these purposes, with significant annual revenues being generated from these activities. In other words, **the proposed exception would expropriate a significant source of revenue for songwriters and music publishers.** In this sense, the caveat that the use of the new work or other subject-matter must be solely for "non-commercial purposes" does little to lessen the damage that the rightsholders would sustain. The same may be true for "sampling" – the deliberate inclusion of a pre-existing musical work or sound recording in the production of a new recording, a particularly common practice in hip-hop and urban music – in relation to which an established and lucrative licensing marketplace has existed for at least 20 years. There is nothing inherent in proposed section 29.21 to distinguish the use of a "sample" of a pre-existing work from any other type of UGC.

91. Moreover, it is important to consider the interaction of proposed section 29.21 with other proposed exceptions. To take just the most obvious example, it is presumably the case that works or other subject-matter created and disseminated within the UGC exception would constitute a copy that is "legally obtained" for the purposes of the proposed exception in section 29.22 for reproduction for private purposes. That being so, the combination of the two exceptions would permit individuals to build their own libraries of UGC, to be used for private purposes. As already discussed, the UGC in question could include one or more entire works, and there would be nothing to prevent the individual from extracting those individual works from the UGC into separate digital files. (Certainly, doing so would not appear to turn the extracted files into "infringing copies," such as to remove them from the scope of section 29.22.) Seen in this way, it becomes clear that **the proposed UGC exception could allow individuals to acquire substantial libraries of musical works and other subject-matter without ever paying for a single copy of anything.**

The proposed exception violates the Berne three-step test

92. As drafted, the UGC exception is not limited in its field of application – particularly in the sense of its purported restriction to vague "non-commercial purposes" and the possibility that it might exempt even collections of whole, unaltered works. Therefore, CSI believes that it is not properly limited to "certain special cases" as required by the first part of the Berne three-step test.

93. Moreover, even though paragraph 29.21(1)(d) appears calculated to dictate compliance with the second and third steps, the requirement that each particular use not have a "substantial adverse effect" on the exploitation of the existing work – with no consideration given to the impact of the widespread use and dissemination of UGC in general – seems not to address the Berne requirement that the exception "not conflict with a normal exploitation of the work" or "unreasonably prejudice the legitimate interests of the author," as required by the second and third steps respectively.

94. Therefore, CSI believes that, as drafted, the proposed UGC exception would offend all three parts of the Berne three-step test. However, this consequence can easily be avoided by explicitly building each of the three steps into the criteria for the exception, as we

propose below. The proposed language would also take into consideration the moral rights of authors and performers, which might otherwise be overridden by the exception as drafted.

Achieving the appropriate balance

95. The success of services such as YouTube demonstrates clearly that UGC is becoming an increasingly important method of exploiting musical works and other subject-matter. Although CSI believes that it is important to enable users to make use of that content in non-infringing ways, that end should be achieved through appropriate licensing mechanisms – many of which already exist – and not through the expropriation of the economic rights of copyright owners through an unprecedented and unnecessary exception.

96. However, it is important that the existing text of section 29.21 be amended to address the concerns set out above. In particular, CSI believes that an appropriate balance between access for users and compensation for rightsholders can be achieved through the collective licensing of UGC when disseminated by an intermediary. To that end, CSI recommends the following:

29.21 (1) It is not an infringement of copyright for an individual to use an existing work or other subject-matter ~~or copy of one~~, which has been published or otherwise made available to the public, in the creation of a new work or other subject-matter in which copyright subsists and for the individual — or, with the individual's authorization, a member of their household — to use the new work or other subject-matter or to authorize an intermediary to disseminate it in digital format, by means of the Internet or other digital network, if

(a) the use of, or the authorization to disseminate, the new work or other subject-matter is ~~done~~ solely for non-commercial purposes;

(b) the source — and, if given in the source, the name of ~~the~~ each author, performer, maker or broadcaster, as the case may be — of the existing work or other subject-matter or copy of it are mentioned, if it is reasonable in the circumstances to do so;

(c) the individual had reasonable grounds to believe that the existing work or other subject-matter or copy of it, as the case may be, was not infringing copyright; ~~and~~

(d) the individual legally obtained the copy of the existing work or other subject-matter, other than by borrowing it or renting it; and

(~~d~~e) the use of, or the authorization to disseminate, the new work or other subject-matter, or the widespread use or dissemination of the existing work or other subject-matter in a similar fashion, does not, and is not likely to, ~~have a substantial adverse effect, financial or otherwise, on the exploitation or potential exploitation of the existing work or other subject-matter – or copy of it – or~~

(i) conflict with the normal exploitation or potential exploitation of the existing work or other subject-matter — or copy of it — or have an adverse effect, financial or otherwise, on an existing or potential market for it, including that the new work or other subject-matter is not, and does not contain, a substitute for the existing one.

(ii) unreasonably prejudice the legitimate interests of any author of the existing work, or any performer, maker or broadcaster of the existing other subject-matter, as the case may be, or

(iii) prejudice the honour or reputation of any author of the existing work or any performer of the existing other subject-matter, as the case may be.

Application

(2) This section does not apply to the dissemination by an intermediary of a new work or other subject-matter created using an existing work or other subject-matter – whether or not for non-commercial purposes – if a licence is available from a collective society to disseminate either or both of the new work or other subject-matter, or the existing work or other subject-matter contained in it, or to reproduce any of those works or other subject-matter for the purpose of such dissemination.

Definitions

(~~2~~3) The following definitions apply in subsections (1) and (2).

"disseminate" « *diffuser* »
"disseminate" means, in relation to a new work or other subject-matter created pursuant to subsection (1), to make it available, communicate it to the public by telecommunication, or otherwise distribute it by means of the Internet or other digital network.

"intermediary"« *intermédiaire* »
"intermediary" means a person or entity who provides ~~space~~ digital memory or other similar means for works or other subject-matter to be ~~enjoyed~~ viewed or heard by the public by means of the Internet or other digital network.

"use"« *utiliser* »
"use" means to do anything that by this Act the owner of the copyright has the sole right to do, other than the right to authorize anything, and includes the dissemination of a work pursuant to subsection (1).

97. As a further alternative, instead of including the further qualification proposed as new subsection (2), the interest of rightsholders in securing fair compensation for the dissemination of UGC, as opposed to its creation for non-commercial purposes, could be achieved by amending subsection 29.21(1) as follows:

29.21 (1) It is not an infringement of copyright for an individual to use an existing work or other subject-matter ~~or copy of one~~, which has been published or otherwise made available to the public, in the creation of a new work or other subject-matter in which copyright subsists and for the individual — or, with the individual's authorization, a member of their household — to use the new work or other subject-matter or to authorize an intermediary to disseminate it in digital format, by means of the Internet or other digital network, if

(a) the use of, or the authorization to disseminate, the new work or other subject-matter is ~~done~~ solely for non-commercial purposes;

(b) the source — and, if given in the source, the name of ~~the~~ each author, performer, maker or broadcaster, as the case may be — of the existing work or other subject-matter or copy of it are mentioned, if it is reasonable in the circumstances to do so;

(c) the individual had reasonable grounds to believe that the existing work or other subject-matter or copy of it, as the case may be, was not infringing copyright; ~~and~~

(d) the individual legally obtained the copy of the existing work or other subject-matter, other than by borrowing it or renting it; and

(~~d~~e) the use of, or the authorization to disseminate, the new work or other subject-matter, or the widespread use or dissemination of the existing work or other subject-matter in a similar fashion, does not, and is not likely to, ~~have a substantial adverse effect, financial or otherwise, on the exploitation or potential exploitation of the existing work or other subject matter – or copy of it – or~~

(i) conflict with the normal exploitation or potential exploitation of the existing work or other subject-matter — or copy of it — or have an adverse effect, financial or otherwise, on an existing or potential market for it, including that the new work or other subject-matter is not, and does not contain, a reasonable substitute for the existing one,

(ii) unreasonably prejudice the legitimate interests of any author of the existing work or any performer, maker or broadcaster of the existing other subject-matter, as the case may be, or

(iii) prejudice the honour or reputation of any author of the existing work or any performer of the existing other subject-matter, as the case may be.

Notwithstanding the foregoing, nothing in this section affects the liability of an intermediary for the use or dissemination of any work or subject-matter without the consent of the copyright owner, whether for non-commercial purposes or otherwise.

However, if provision is made for the collective licensing of UGC when disseminated commercially, this more restrictive condition should not be necessary.

98. In either event, CSI believes that a further consequential amendment would be required. In order to prevent UGC intermediaries from benefitting unintentionally from the "hosting" exception in subsection 31.1(6). CSI recommends that this subsection be revised as follows:

(6) Subsection (5) does not apply in respect of a work or other subject-matter if

(a) the person providing the digital memory knows of a decision of a court of competent jurisdiction to the effect that the person who has stored the work or other subject-matter in the digital memory infringes copyright by making the copy of the work or other subject-matter that is stored or by the way in which he or she uses the work or other subject matter; or

(b) the work or other subject-matter is a new work or other subject-matter created pursuant to subsection 29.21(1), or an existing work or subject matter that is incorporated into that new work or other subject matter, and the person providing the digital memory is acting as an "intermediary" as defined in subsection 29.21(2).

99. CSI also recommends that the government consider clarifying the intended meaning and application of "non-commercial," including not only defining the term but also revisiting its use in the Act alongside the closely-related terms, "private use" and "private

purposes." The use of three different and undefined terms which, while similar, are obviously different in their intended scope, can only lead to unnecessary confusion and litigation.

CONCLUDING COMMENT

100. Contrary to the government's public statements, it is unrealistic to expect that the other measures contained in Bill C-32 as initiatives to implement the WIPO treaties would result in an increase in online music revenues for authors and publishers of musical works that will be sufficient to offset the revenue losses documented above. In fact, for the music industry these measures would be unlikely to result in any substantial increase in legitimate online revenues.

101. This can best be seen by comparing the growth in sales of legal digital downloads of music in Canada with the corresponding growth pattern in the United States, where the WIPO treaties were implemented in 1998.

102. The major supplier of electronic downloads, iTunes, began to operate in Canada 18 months later than in the United States. However, since iTunes' entry into Canada in December of 2004, the rate of growth of online sales in Canada has every year been much more rapid than in the United States. Between 2005 and 2010 the sale of paid, legal downloads of individual songs or single tracks increased by 914% in Canada, compared to 232% in the United States. Similarly, the increase in sales of digital albums increased over the same period by 1207% in Canada, compared to 431% in the United States. The extent of the difference on an annual basis, using sales data from Nielsen SoundScan (which collects comparable information on sales of recorded music for the United States and Canada) is shown in Table 3.

TABLE 3
Year-over-Year Percentage Increase in Electronic Downloads of Music, Canada and the United States, 2005 to 2010

Canada	2006	2007	2008	2009	2010	**2005 to 2010**
Single Tracks	122%	73%	58%	39%	20%	**914%**
Digital Albums	123%	93%	69%	44%	24%	**1207%**
United States						
Single Tracks	65%	45%	27%	8%	1%	**232%**
Digital Albums	101%	53%	32%	16%	13%	**431%**

Source: Nielsen SoundScan.

103. As a result, CSI fundamentally disagrees with the suggestion that the "modernization" measures in Bill C-32 are in any way necessary in order to improve the fortunes of the music industry. To the contrary, the Bill would do serious harm to the

song-writing and music publishing communities, destroying existing markets and foreclosing potential new ones while delivering nothing of value to assist with the exploitation or monetization of valuable rights. If the government is serious about promoting "balance" between the rights of copyright owners and the interests of users, it should do so by maintaining and expanding the existing system of collective licensing, which has facilitated easy and convenient access to works by users while also guaranteeing fair and reasonable compensation for rights holders. Instead, Bill C-32 would effectively destroy this system, granting users a host of new, uncompensated exceptions and leaving rights holders with an unsatisfactory patchwork of practically unenforceable rights. Whatever that policy might represent, it is anything but "copyright modernization."

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

[ii] Professor Murphy's curriculum vitae and the full text of the Executive Summary of his report are provided at Appendix A, along with an extract from his report that summarizes his conclusions concerning the ability of broadcasters to comply with a 30-day limitation with respect to each type of reproduction made, and for both radio and television. The full text of his current report and copies of his earlier expert reports on radio and television technology are available on request.

[iii] Expert Witness Reports filed with the Copyright Board of Canada:
Report on Contemporary Radio Broadcasting Technology, Sept. 3, 2008 &
Report on Contemporary Broadcasting Technology, February 1, 2010

[iv] Copyright Consultations 2009, Submission of the Canadian Association of Broadcasters, paragraphs 42 & 43.

[v] Decision of the Board, July 9, 2010.

[vi] Executive Summary of the CAB Radio Board's submission to the House of Commons committee reviewing the legislation, page 1, Executive Summary.

[vii] Ibid.

[viii] Copyright Consultations 2009, Submission of the Canadian Association of Broadcasters, page 20, paragraph 100.

[ix] Decision of the Board, October 14, 2005, page 21.

[x] Decision of the Board, July 9, 2010, page 67, paragraph 210.

[xi] Decision of the Board, March 28, 2003.

[xii] Copyright Consultations 2009, Submission of the Canadian Association of Broadcasters, page 9, para. 45.

[xiii] Laurel Hyatt, *Radio 'casters hope copyright reform will ease impact of music tariff decision*, July 19, 2010, www.cartt.ca/news/FullStory.cfm?NewsNo=10251 (accessed July 2010).

[xiv] In addition, section 1(4) of the World Intellectual Property Organization (WIPO) Copyright Treaty, which Canada signed in December 1997, states as follows: "It is understood that the storage of a protected work in digital form in an electronic medium constitutes a reproduction within the meaning of Article 9 of the Berne Convention."

[xv] "Reproduction can be 'in any material form whatever'. The *Act* is media neutral, ensuring that copyright owners have rights which encompass technological advances in the expression or communication of their works without the necessity of statutory change. That is, copyright protection subsists in original works fixed in any medium from which the works can be reproduced or otherwise communicated." Robertson v. Thomson.

[xvi] As a US Court of Appeal decided in the Cablevision decision in 2008: "A work must be embodied in a medium, i.e. placed in a medium such that it can be perceived, reproduced, etc. from that medium (...) it must remain thus embodied for a period of more than transitory duration."

SUMMARY OF RECOMMENDATIONS

Section 30.9: Ephemeral Recordings – Broadcasting Undertaking

Do not repeal the existing s. 30.9(6) of the *Act*, which provides that there is no exception where a licence is available from a collective society.

Section 30.71: Reproduction for Technological Processes

Proposed new s. 30.71 **should be withdrawn.** In the alternative, the section should be modified to include only reproductions with no significant economic value whose duration is no more than transitory. The exemption should expressly not apply to reproductions subject to ss. 30.8 and 30.9.

Section 29.24: Backup Copies

Proposed section 29.24 **should be amended** to:

- permit the making of one backup copy only; and
- exclude copies already covered by a contract, licence, tariff or existing statutory scheme, including Part VIII, and copies made by broadcasters.

Section 29.23: Fixing Signals and Recording Programs for Later Listening or Viewing

Proposed section 29.23 **should be amended** to:

- prohibit the sale, rental or other distribution of copies;
- require that the copies be only for the "private use" of those who make them; and
- exclude programs transmitted by subscription services and on-demand services.

Further, it should not apply to single works.

Section 29.21: Non-Commercial User-Generated Content

Proposed section 29.21 **requires the following major amendments**:

- Limit the exception to online dissemination, excluding physical media;
- Require that any existing works used are obtained legally;
- Consider the effect that widespread use or dissemination of an existing work in UGC – not just a single individual instance – would have on the market for the original work or other subject matter;
- Explicitly build in the Berne three-step test;
- Explicitly require consideration of the moral rights of authors and performers;
- Exclude intermediaries like YouTube from the exception if a licence is available from a collective society; and
- "Non-commercial" must be defined in relation to "private use" and "private purposes" to ensure individuals are not free to build libraries of whole works extracted from UGC for "private purposes" without payment.

In the absence of these amendments, the proposed UGC exception should be withdrawn.

Appendix A

Executive Summary and Extract of

Report on the Impact of Bill C-32
on Music Reproductions by Broadcasters

and

Curriculum Vitae of

Professor Michael Murphy

EXECUTIVE SUMMARY

1. Bill C-32 contains amendments to the *Copyright Act* which would repeal the existing subsection 30.9(6), which provides that there is no exception for "ephemeral" recordings where a licence is available from a collective. Section 34 of Bill C-32 would also amend subsection 30.9 (4), which deals with the destruction of reproductions made by the broadcaster. To take advantage of the exception, reproductions would have to be destroyed when the broadcaster no longer possesses the sound recording, performance or work, or when its licence to use the sound recording, performance or work expires, ***or "at the latest within 30 days after making the reproduction, unless the copyright owner authorizes the reproduction to be retained"*** (emphasis added).

2. CMRRA, SODRAC and CMRRA-SODRAC Inc. (CSI) have commissioned this report to investigate whether, if Bill C-32 were passed, Canadian broadcasters could potentially comply with the technical requirements of subsection 30.9 (4) that copies be destroyed within 30 days, and thus seek to avoid any obligation to obtain licences for their digital libraries and other reproductions of musical works. The report assumes that broadcasters would comply with the requirement that they possess the sound recording, performance or work, or a licence to use the sound recording, performance or work.

3. This report first examines the technology used by commercial radio and television broadcasters and identifies the digital reproductions of music (copies) used in the production, programming and delivery of broadcast programming. Each of the different types of digital copies created in the course of broadcasting operations is then examined to determine whether it meets, or could meet, the 30 day limit that would come into effect if the provisions currently proposed in Bill C-32 were passed into law. The report then explores scenarios where commercial radio and television broadcasters could alter their operating practices, using existing technology, to comply with the requirement that reproductions should be destroyed within 30 days.

4. The typical practice of broadcasters involves and requires making multiple copies of the same sound recording, performance or work, with different types of copies serving different purposes. The study identifies a number of types of digital reproductions that are either presently erased before 30 days, or could easily be erased with little impact on radio and television broadcast operations. Other types of copies of the same sound recordings, performances and works, that are currently retained on a more permanent basis would require procedural and workflow adjustments in order to be erased before 30 days. The report explores scenarios that might allow a broadcaster to alter operations in a way that would eliminate some or all digital copies that presently require a lifespan of greater than 30 days, identifying the technical and financial requirements to do so.

5. The report concludes that Canadian broadcasters could indeed comply with the technical requirement of Bill C-32 subsection 30.9 (4) that they destroy all reproductions within the 30 day period prescribed in the Bill. While many reproductions of each sound recording, performance or musical work are made, they can be broadly classified into two categories. Radio and television stations make use of many reproductions that are either erased

before 30 days, or they can easily modify processes to ensure that they are erased within this time limit. For digital copies that are presently retained for greater than 30 days, technical and procedural options are available that could allow broadcasters to "recreate" or refresh their libraries of musical works every 30 days and thus comply with the 30 day provision for these types of copies as well. As a result, each type of copy of a musical work that is made for broadcasting purposes would remain a so-called ephemeral copy. However, by making copies of copies, the broadcaster would have the use of the work for as long as it was beneficial to the broadcaster. The changes necessary to meet the 30 day requirement involve little to no additional cost to implement and would be applicable for both radio and television operations. The changes required will only become more viable in the future as bandwidth speeds increase and digital technology continues to increase in capacity and decrease in cost.

4. POTENTIAL TO COMPLY WITH THE 30 DAY REQUIREMENT

69. The typical practice of broadcasters involves and requires making multiple copies of the same sound recording, performance or work. Different types of copies serve different purposes. In this section, we will consider whether, for each of the different types of copies described above, broadcasters could meet the requirement that reproductions used for broadcasting purposes must be destroyed within 30 days in order to qualify for the "ephemeral" exception.

4.1 RADIO BROADCASTING

4.11 Ingesting and Producing an Enhanced Copy

70. The original copy may take the form of a CD or a download from a service such as DMDS. Where the original copy is a CD, the digital copy ripped from the CD will be altered to add metadata, such as the information about the song, title, genre, etc.. Where the original copy is obtained from DMDS, metadata may also be added or amended. At this stage the file is "trimmed" to eliminate any dead air, or other system-required information is added, like the number of seconds of the song intro (time at the song beginning before the vocal begins). In either case, a new "enhanced" copy is created on the ingest workstation where it remains for the duration of the manipulation, typically a period of no more than a few hours to a few days. The resultant music file can then be copied onto the main automation system hard drives and erased from the ingest workstation. A radio station could easily implement a manual or automated procedure to ensure that this ingest workstation copy is erased in a timely manner in order to comply with the proposed 30 day requirement.

4.12 Music Evaluation Copies

71. Program and Music Directors make additional copies of music files on computers and other devices (iPods/MP3 players) for evaluating whether or not to add a song to the station's play list. Often this involves audience testing and other research. Typical evaluation periods span days and weeks. In any event, radio stations can easily adopt a procedure whereby music evaluation copies exist for no more than 30 days before erasure. If additional testing or evaluation is required that extends past 30 days, a fresh evaluation copy can be generated from the main server copy, thus meeting the proposed 30 day requirement.

4.13 Voice-Tracking Copies

72. The process of voice-tracking provides cost savings to a radio station by compressing the amount of announcer time required to produce automated programming. Remote voice-tracking allows talent to do voice-tracking away from the station by using the internet to connect to any location in the world. A remote voice-tracking server creates new compressed copies of the required song files and transfers them by internet to a remote location where they are active until the voice-tracking shift is completed by the announcer. Radio stations can easily implement a procedure to ensure that these temporary copies are erased immediately upon completion of the shift, thus meeting the proposed 30 day requirement.

4.14 Internet and Mobile Streaming

73. When radio stations stream their content over the internet, a buffer copy of a few seconds of the audio is created to facilitate the time required to encode the audio material and deliver it on the internet. As the buffer copy is already continuously purged every few seconds, no procedural or process adjustment is required as the copy is presently erased within 30 days.

4.15 System Backup and Logging Copies

74. Radio stations maintain one and often multiple copies of the data contained on the main automation system hard drives to provide backup in case of system failure or catastrophic emergency. Typically backups are kept for days to weeks before they are erased in order to make newer backups. A radio station may presently be keeping some long-term backups that extend past 30 days (for example by using a system to store only incremental changes to the server discs), but this could be easily modified by a procedure that ensures that full backups are created to replace any files before a 30 day limit, thus meeting the proposed 30 day requirement.

75. Radio stations also keep logging copies of all programming for a minimum 30 day period, but this is a CRTC requirement.

4.16 Main Automation System Server Copy

76. As identified above, many of the digital copies created in a radio operation can easily be erased within a 30 day window. The main and perhaps most important exception is the song file in the main automation server music library. Typically, this file is kept on the hard drive in perpetuity. However, this is more a function of convenience than of need. Audio files are relatively small and hard drive technology is relatively inexpensive on a per Gigabyte basis. A very large radio station music library can easily fit within a 1 or 2 terabyte hard drive, and these drives are now available for a few hundred dollars.

77. While the song file may not be required in perpetuity, it is usual that a song will stay on a radio station playlist for a duration exceeding 30 days. In these cases, it is a simple and efficient process for a server to create a new copy before a 30 day window and erase an existing copy. The new copy could be created on a secondary hard drive or even on a new location of the existing drive. Recopying costs and processes to implement this scenario are marginal. In this simple and cost-effective way, a radio station could modify its procedures to meet the proposed 30 day requirement, and still have use of the work for as long as was beneficial to the broadcaster.

4.2 TELEVISION BROADCASTING

4.21 Manual Ingest and Video Server Copies

78. If a television station uses a manual ingest operation, it only copies the video program from the delivered videotape to the video server a few hours or days before airtime. Because video files are an order of magnitude larger than audio files, it is more common that television programming is not presently kept on the active video server hard drives for a period longer than a few days, or as long as the program is scheduled to go to air in the upcoming broadcast window. While this may change in the future due to decreasing hard drive cost and increasing capacity, at the present time the video server copy is erased before the proposed 30 day limit, and no operational change is required.

4.22 Production and Post-Production Copies

79. Production and post-production copies of television programming typically exists on servers and workstations for the duration of the process being undertaken. It would be a straightforward process to ensure that any video files which contain musical works are either erased from the workstations and servers before 30 days, or are re-copied and erased to meet the proposed 30 day limit.

4.23 Automated Ingest using a Content Management System (CMS)

80. If a television station uses a CMS and an automation system, it generates a number of digital copies which presently have a life exceeding 30 days. For example, instead of relying on the master video tape, it is usual to ingest the tape and store a digitized copy of the tape on nearline storage, perhaps after editing the program for time, language translation and close-captioning. In addition, it is often the case that the program is also transcoded into the video format required by the video server (typically MPEG-2, MPEG-4 or other proprietary formats) and this copy is also stored on nearline storage. A further low resolution proxy file is often created and this copy is also stored on an administrative server. All of these multiple copies are at present stored for the duration of the negotiated broadcast licence which typically exceeds 30 days. In these cases, it would be possible for a server to create a new copy before a 30 day window and erase an existing copy. The new copy could be created on a secondary hard drive or on a new nearline device (tape or other digital media) or even on a new location of the existing drive. However, due to the greater size of video files, recopying costs and processes to implement this scenario would be substantial.

81. While the copy and paste scenario would work well in a radio environment, it is less viable when applied to present television operations. As mentioned earlier, video files are from one to two orders of magnitude larger than audio files, even when compressed. As a result, transfer times and the associated infrastructure required to implement roughly equivalent systems in a video environment would be slow, cumbersome and much more expensive. It should be noted that this analysis is based on existing technology. Future increases in memory capacity and higher data transfer speeds and systems may alter this conclusion at some future time.

4.24 Internet and Mobile Copies

82. When television stations stream their content over the internet, a buffer copy of a few seconds of the video is created to facilitate the time required to encode the video material and deliver it on the internet. As the buffer copy is already continuously purged every few seconds, no procedural or process adjustment is required as the copy is presently erased within 30 days.

83. When television stations copy programs onto a web server for delivery of "Catch-up" episodes to internet and mobile devices, these transcoded copies are typically kept on the web server for a period of time that can exceed 30 days. Because these video files have been compressed for internet delivery and are smaller than the original uncompressed video files, they could be more easily recopied and erased to meet the proposed 30 day requirement using today's available technology without significant additional cost or system modification.

4.25 System Backup and Logging Copies

84. Television stations also maintain one and often multiple copies of the data contained on the main automation system hard drives to provide backup in case of system failure or catastrophic emergency. Often, the nearline system itself is used to provide program file backup. A television station may presently be keeping some log-term backups that extend past 30 days (for example by using a system to store only incremental changes to the server discs), but this could be easily modified by a procedure that ensures that full backups are created to replace any files before a 30 day limit, thus meeting the proposed 30 day requirement.

85. Television stations also keep logging copies of all programming for a minimum 30 day period, but this is a CRTC requirement.

CV of Dr. Michael Murphy

I am a Full Professor with tenure at Ryerson University's School of Radio and Television Arts and I am also the former Head of the Audio and Digital Media Department of this school. Previously, I was Academic Director of the Rogers Communications Centre at Ryerson University.

I am a Professional Engineer registered in the Province of Ontario. I hold a PhD in Management Science and Information Systems, a Master of Business Administration (MBA), a Bachelor of Applied Science in Electrical and Computer Engineering and a Bachelor of Arts in Music.

My expertise is in digital technology applications in media and broadcasting. In the 1970s and 1980s, I was employed by Northern Telecom's Digital Switching Division and held various engineering and management positions, including Manager of Strategic Planning, Product Manager and Systems Engineer. I was involved in the development and deployment of some of the first products to use digital techniques to convert analog audio for telephone applications. I was also involved in the development of Northern Telecom's first products for cellular telephony, as well as ISDN (Integrated Services Digital Networks).

As a Research Professor, my work over the last twenty years has been in developing new digital applications for media production and delivery. In 1997, my research team developed the world's first multi-terabyte Web server for media applications integrating nearline technologies. My research work has been recognized by peer review, and I was selected in 2002 by the Canada Foundation for Innovation (CFI) as one of Canada's "thirty-three unique individuals whose research has impacted the quality of life of Canadians and continues to shape our future."[1] At Ryerson University, I teach courses at the graduate and undergraduate level in Advanced Communication Technology, Radio and Audio Production, Advanced Audio Theory, and Broadcasting History; I also supervise graduate student research in the field of Communication, Culture and Media.

In 2001–2002, I was a Visiting Research Scientist at the Fraunhofer Institute in Stuttgart, Germany. In 2008 – 2009 I was a Visiting Professor at the Hochschule der Medien in Stuttgart, Germany (Stuttgart Media University). I regularly lecture on digital media applications in academic environments and have given invited lectures at institutions in the USA, Europe and Asia. I am a member of the Audio Engineering Society (AES) and a Fellow of the International Information Management Association (IIMA). I am the owner of Michael J Murphy Consulting and provide media and technology research and consulting services for both public and private-sector clients.

I have appeared before the Copyright Board of Canada to provide expert testimony on three occasions: in 2007 during the hearings on Multi-Channel Subscription Services (Satellite Radio Technology), in 2008 during the hearings on Commercial Radio, and in 2010 in the Joint Arbitration between SODRAC and SRC/CBC and Groupe Astral.

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[1] Convergence, Interactive Media, and Innovation. Retrieved Nov. 8, 2010, from http://www.innovation.ca/innovation2/essay_murphy.html and http://www.innovation.ca/innovation2/index.html

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DEGREES:

Ph.D.	Information Systems, McMaster University, 1992
M.B.A.	Marketing & Finance, York University, 1981
B.A.	Music, Queen's University, 1979
B.Sc.	Electrical and Computer Engineering, Queen's University, 1978

EMPLOYMENT HISTORY:

2002–2010	Head of Audio & Digital Media, School of Radio & Television Arts, Ryerson University
2008-2009	Visiting Professor, Hochschule der Medien, Stuttgart, Germany
2001–	Full Professor, School of Radio & Television Arts, Ryerson University
2001–2002	Visiting Research Scientist, Fraunhofer Institute- IAO, Stuttgart, Germany
2001–2002	Visiting Professor, Hochschule der Medien, Stuttgart, Germany
1995–2001	Academic Director, Rogers Communications Centre, Ryerson University
1994–1995	Associate Director, Rogers Communications Centre, Ryerson University
1993–2001	Associate Professor, Radio & Television Arts, Ryerson University
1991–1993	Assistant Professor, School of Business, University of Victoria
1990–1991	Lecturer, Management, University of Toronto
1988–1990	Research Associate, Management of Technology Institute, McMaster University
1985–1987	Senior Manager, Strategic Planning, ISDN, Northern Telecom (Nortel)
1981–1983	Product Manager, Special Products, Northern Telecom (Nortel)
1978–1981	Systems Engineer, Digital Systems, Northern Telecom (Nortel)

HONOURS:

- Fellow, International Information Management Association (IIMA), San Bernardino, Calif., 2003
- Selected by Canada Foundation for Innovation (CFI) as one of 33 most innovative Canadian Researchers, 2002; see http://www.innovation.ca/innovation2/index.html
- Awarded German Academic Exchange Service (DAAD) Visiting Professorship for Germany, 2001
- Awarded NSERC Postgraduate Scholarship, 1983–1984 & 1984–1985
- Awarded Northern Telecom Ph.D. Fellowship, 1983–1984 & 1984–1985
- Awarded Ontario Graduate Scholarship, 1983–1984 & 1984–1985

Appendix B

Expert Report of Professor Ralph Oman
on the Ephemeral Exception in
United States Copyright Law

EXPERT REPORT OF RALPH OMAN, ESQUIRE

I have been retained by the Canadian Musical Reproduction Rights Agency ("CMRRA") and the Société du Droit de Reproduction des Auteurs, Compositeurs et Éditeurs au Canada ("SODRAC") to provide an expert opinion on the provisions of U.S. copyright law that govern the use of musical works by broadcasting companies, specifically the provisions that allow broadcasters to make ephemeral recordings of musical works. I respectfully reserve the right to supplement or amend this report if additional information becomes available.

I make the following statements of my own personal knowledge and experience.

I. QUALIFICATIONS

Currently I am the Pravel Professorial Lecturer in Patent and Intellectual Property Law at the George Washington University Law School in Washington, D.C., where I have taught copyright law for 17 years. I have a total of 35 years of experience in domestic and international copyright law.

From 1985 through 1993, I served as the Register of Copyrights of the United States. As the Register of Copyrights, I was the chief government official responsible for administering the U.S. copyright system. Among other responsibilities, the Register of Copyrights rules on the copyrightability of works, and supervises the work of the corps of examiners. I am familiar with the U.S. copyright law and U.S. Copyright Office rules, regulations, and procedures, including those that relate to the use of ephemeral recordings. I served as principle copyright advisor to the U.S. Congress, and as Register I testified before them more than 40 times. I continue in that advisory capacity. In September of 2008, August of 2009, and July of 2010, I testified before Congress on pending copyright legislation.

Internationally, as Register I represented the United States at official meetings and diplomatic conferences, and I served as principal advisor to the U.S. Department of State on copyright matters, including drafting, negotiating and implementing international copyright treaties. In that capacity, I made several visits to Ottawa, and I worked closely with the Canadian delegation at the World Intellectual Property Organization in Geneva. During my tenure as Register, I helped move the United States into the Berne Convention for the Protection of Literary and Artistic Works.

Before becoming Register, I served in other government positions, including Chief Counsel of the U.S. Senate Subcommittee on Patents, Copyrights, and Trademarks, and Chief Counsel of the U.S. Senate Subcommittee on Criminal Law. I also served as Counsel to Senator Hugh Scott on the U.S. Senate Subcommittee on Patents, Trademarks and Copyrights. In that capacity, I participated in the final drafting and negotiations that led to passage of the landmark U.S. Copyright Revision *Act* of 1976, the current statute.

I am a graduate of Hamilton College (A.B., 1962) and Georgetown University Law Center (J.D., 1973), where I served as Executive Editor of Law and Policy in International Business. I am a Past President of the Giles S. Rich American Inn of Court (which is the intellectual property Inn for Washington, D.C.), a former Trustee of the Copyright Society of the United States of America, and the Chair of the American Bar Association's Committee on Government Relations to Copyright.

II. EXPERT OPINION

A. Ephemeral Recordings

Under U.S. law, copyright owners must be compensated whenever broadcasters copy or perform their musical works. This is required by § 106(1) of the U.S. Copyright Act, which gives copyright owners the exclusive right to reproduce their musical works, and by § 106(4), which gives them the exclusive right to perform their musical works. However, the right of reproduction is limited by § 112(a),[2] which gives radio broadcasters the right to make a temporary copy of their programs, even if those programs contain copyrighted musical works. These types of copies are known as "ephemeral recordings."

Historically, broadcasts usually contained many different segments from many different sources. Sometimes broadcasters had trouble putting these segments together while they were transmitting their programs. Therefore, they usually made a "temporary" copy of their programs, joining together all of the various components, including any musical works, before they transmitted those programs over the airwaves.

When the U.S. Congress revised the U.S. Copyright Law in 1976, it created a statutory exception to copyright liability for these types of "ephemeral recordings." As the legislative history explains:

> Section 112 of the amended Bill concerns itself with a special problem that is not dealt with in the present statute but is the subject of provisions in a number of foreign statutes and in the 1948 Brussels revision of the Berne Convention. This is the problem of what are commonly called "ephemeral recordings": copies or phonorecords of a work made for purpose of later transmission by a broadcasting organization legally entitled to transmit the work.
>
> In other words, where a broadcaster has the privilege of performing or displaying a work either because he is licensed or because the performance or display is exempted under the statute, the question is whether he should be given the additional privilege of recording the performance or display to facilitate its transmission. The need for a limited exemption in these cases

[2] Section 112(a) does not limit the performance right.

> because of the practical exigencies of broadcasting have been generally recognized, but the scope of the exemption has been a controversial issue.

Copyright Law Revision, Sen. Rep. No. 94-473, at 15 (Nov. 20, 1975); H.R. Rep. No. 94-1476, at 133-34 (Sept. 3, 1976). Everyone agreed that the broadcasters should be given a limited privilege allowing them to make temporary copies of copyrighted works to facilitate their licensed performance of those works. The question was, what limitations should be imposed on this privilege? *See* Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law: 1965 Revision Bill, at 45-47 (May 1965).

Under Section 112(a) of the U.S. Copyright Act, broadcasters are allowed to make a single, temporary copy of their "transmission programs," even if those programs contain copyrighted musical works. More important, over-the-air broadcasters are allowed to make these temporary copies without having to seek the permission of (or pay a royalty to) the copyright owners for the reproduction of those musical works. However, broadcasters must comply with the following conditions in order to claim the benefit of this exemption. If the broadcaster fails to comply with these conditions, "the making of an 'ephemeral recording' becomes fully actionable as an infringement." Sen. Rep. No. 94-473, at 18 (Nov. 20, 1975).

- First, the broadcaster must have the right to perform the copyrighted musical work during the course of its broadcast. 17 U.S.C. § 112(a)(1). Broadcasters usually obtain this right through arms-length negotiations with a performing rights society, such as ASCAP or BMI.
- Second, the broadcaster is only allowed to make a single copy of a "*transmission program*" that contains copyrighted musical works. 17 U.S.C. § 112(a)(1). If the broadcaster makes additional copies, the copyright owners must authorize and must be compensated for that additional use.
- Third, the broadcaster is not allowed to use ephemeral recordings made by other broadcasting organizations. 17 U.S.C. § 112(a)(1)(A). In this context, the term "broadcasting organization" refers to both local broadcasters and broadcasting networks. Thus, an ephemeral recording made by CBS or a CBS affiliate may be used by any member of that broadcasting network, but it cannot be used by stations affiliated with another network.
- Fourth, ephemeral recordings must be used solely within the broadcaster's local service area, 17 U.S.C. § 112(a)(1)(B), that is "within the radius that its signal 'is expected to reach effectively under normal conditions.'" Sen. Rep. No. 94-473, at 19 (Nov. 20, 1975).
- Fifth, the broadcaster must destroy its ephemeral recording within six months after the transmission program has been broadcast to the public,

unless the broadcaster retains that recording solely for archival purposes.[3] 17 U.S.C. § 112(a)(1)(C).

B. "Digital Libraries"

The ephemeral exemption was an important victory for the broadcasting industry. However, it is important to recognize that § 112(a) "is still firmly based upon the traditional concept of ephemeral recordings as mere technical adjuncts of broadcasting that have no appreciable effect on the copyright owner's rights or market for copies or phonorecords." H.R. Rep. No. 83, at 139-40 (Mar. 8, 1967). Indeed, the legislative history specifically states that the U.S. Congress did not intend to make changes "that could convert the ephemeral recording privilege into a damaging inroad upon the exclusive rights of reproduction and distribution." *Ibid.* at 140.

Historically, most U.S. radio broadcasters transmitted their programs to the public by simply placing a compact disc in a CD player and broadcasting it over the airwaves. And if they needed to make an ephemeral recording to facilitate their broadcasts, they made them from the CDs, LPs, or cassettes that they purchased or received gratis from the record companies.

Beginning in the 1980s some broadcasters changed the way that they deliver their programming to the public. Most broadcasters now copy the content of CDs onto the hard-drive of a computer, and then use the computer files to piece together the program's component parts before broadcasting their programs over the airwaves. And if they need to make an ephemeral recording to facilitate their broadcasts, they use their computer files instead of the original CD or phonorecord. This activity joins the issue: Do these reproductions fall within the ephemeral recording exception set forth under § 112(a) of the U.S. Copyright Act? For the reasons set out in this report, they do not.

The ephemeral exemption gives broadcasters the right to make a single copy of their "transmission programs". 17 U.S.C. § 112(a)(1). A "transmission program" is "a body of material that, as an aggregate, has been produced for the sole purpose of transmission to the public in sequence and as a unit," 17 U.S.C. § 101. In other words, an ephemeral recording only qualifies for the exemption under § 112(a) if it contains a "body of material" that the broadcaster created "for the sole purpose" of presenting that material to the public in a particular "sequence and as a unit." Therefore, based on this definition, when radio broadcasters copy their collection of CDs onto a computer hard drive, they cannot claim the benefit of the ephemeral exemption set forth under § 112(a). These computer files are not part of a larger "body of material" (in other words, the program itself) that the broadcasters create for the specific purpose of presenting that material to the public. They are simply a collection of all the musical works on the broadcasters' play list that the broadcaster may or may not broadcast on future programs. Nor are these files arranged in a particular "sequence" for transmission to the public "as a

[3] In other words, broadcasters may keep their ephemeral recordings for an unlimited period of time as long as they were made for archival purposes. So in this context the term "ephemeral recording" is really a misnomer.

unit." They are organized by, for example, the name of the artist, by the genre of music, by the name of the song, or by length of playing time, so that program producers or the disc jockeys can access them conveniently one at a time.

The legislative history confirms that the ephemeral exemption gives broadcasters the right to reproduce their "transmission programs," including any musical works that those programs may contain. But it does not give them the right to reproduce those individual recordings and musical works standing alone. In the original version of the statute, the exemption gave broadcasters the right "to make no more than one copy or phonorecord of the work." The broadcasters objected that this provision was unduly restrictive, because it would prevent them from using a hit song in separate ephemeral recordings of different programs. *See* Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law: 1965 Revision Bill, at 47 (May 1965). Therefore, Congress revised the language to make it clear that broadcasters "could make only one copy or phonorecord of a particular 'transmission program' containing a copyrighted work, but would not be limited as to the number of times the work itself could be duplicated as part of other 'transmission programs.'" H.R. Rep. No. 94-1476, at 136 (Sept. 3, 1976). This revision confirms that the right to make an ephemeral recording does not allow broadcasters to reproduce a musical work standing alone, but only if it is included as part of a larger program.

Finally, the ephemeral recording exemption only applies when the copy is "retained and used solely by the transmitting organization that made it," and "no further copies or phonorecords [of the "transmission program"] are reproduced from it." In other words, radio broadcasters are allowed to make ephemeral recordings from a lawful copy of a musical work, but they are not allowed to use those temporary copies to make additional recordings. *See* H.R. Rep. No. 94-1476, at 136 (Sept. 3, 1976). But apparently that is precisely what the radio broadcasters are doing.

Even so, U.S. broadcasters, instead of making their ephemeral recordings from the CDs that they purchase or receive gratis from the record companies, make them from the files in their digital libraries or from online subscription services. The radio broadcasters would argue that what they're doing falls within the spirit of § 112(a), even if it is not covered by the letter of the law. By copying their CDs onto a computer, they say they are simply facilitating the transmission of their broadcasts. But it is important to remember that the ephemeral exemption is a narrow exception to the reproduction right. It does not give broadcasters the right to copy all of their CDs onto a computer hard drive. Nor does it give them the right to use their computer files to "facilitate" their broadcasts. It only gives radio broadcasters the right to make a single copy of the "transmission programs" that they actually transmit over the airwaves. Therefore, if U.S. radio broadcasters would like to build and maintain a digital library of all the musical works in their collection, they cannot rely on the ephemeral recording exemption. Instead, under the 1976 *Act*, they must obtain a license from the music publishers before they engage in these types of activities.

In 1998 the U.S. Congress created a statutory license that governs the use of sound recordings in the digital environment. This license gives broadcasters the right to broadcast sound recordings in a digital format, and the right to make as many ephemeral recordings as they need to facilitate their transmissions, in recognition of the need to accommodate the many different technological formats available to transmit the programs to the public. Because this is a compulsory license, the record companies have no choice but to give the broadcasters the right to make these ephemeral recordings, as long as the broadcasters pay the record companies for those additional copies. The royalty rates that govern the use of ephemeral recordings may be set through voluntary negotiation, or, if necessary, by the judges on the Copyright Royalty Board (CRB).

The U.S. Congress has determined that multiple ephemeral recordings have economic significance to the broadcasters, and that the broadcasters must pay the record companies in order to make additional copies of their ephemeral recordings. However, this statutory license does not give broadcasters the right to make without payment multiple copies of a musical work to facilitate their transmissions. Nor does it give radio broadcasters the right, without payment, to build and maintain a digital library of all the musical works in their collection. In order to engage in these types of activities, broadcasters would have to get permission from the music publishers, presumably in exchange for some form of monetary payment. It strikes me as highly unlikely that the U.S. Congress would allow the broadcasters to create these everlasting digital archives without the approval of, or without a continuing royalty stream for, the music publishers, particularly in light of the decision Congress has already made with respect to reproduction rights in sound recordings.

In amending the copyright law in 1998, the U.S. Congress noted several technical reasons why webcasters had to make multiple "ephemeral" copies of the recordings, including the need to use the recordings on different servers, to make transmissions at different times, and to use different transmission software. Nonetheless, Congress made clear that " . . . the royalty rate payable under the statutory license may reflect the number of phonorecords of a sound recording made under a statutory license for use in connection with each type of service." Conference Report on the Digital Millennium Copyright Act (1998) at 90. It also made clear in the 1998 amendment to Section 112 that " . . . [n]othing in this provision annuls, limits, impairs, or otherwise affects in any way the existence or value of any of the exclusive rights of the copyright owners . . . in a musical work, including the exclusive rights to reproduce and distribute a . . . musical work.." 17 U.S.C. 112(e)(8).

Following the same rationale, in its proceeding to set the proper royalty rates under Sections 112 and 114 for Satellite Radio Services (SRS), the Copyright Royalty Board "considered what portion of the rate should be attributed to their right to make 'ephemeral copies' of musical works. [In doing so,] [u]nder 17 U.S.C. 112, the [Board] is to set the royalty for an ephemeral copy at the level "most clearly represent[ing] the fees that would have been negotiated in the marketplace between a willing buyer and a willing seller." 571 F.3d 1220 (D.C. Cir. 2009) at 1223.

With all of this evidence before us, it seems clear that the U.S. Congress has not provided, and never intended to provide, a blanket copyright exception for the making of ephemeral copies of copyrighted works in digital format. Congress recognized that digital copying poses a much greater danger to creators than analog copying. The evolving congressional approach to ephemeral recordings reflects this new concern. The U.S. Congress thought it important to keep open the possibility of royalties for ephemeral copying as the technology-driven marketplace evolved and found new ways to broadcast and transmit copyrighted works to the public.