Copyright Consultations 2009

Submission of the Canadian Association of Broadcasters

CAB | ACR

Executive Summary

The Canadian Association of Broadcasters (CAB) welcomes this opportunity to formally state its perspective on copyright reform. The CAB's copyright concerns are consistent with the Government's stated objectives in the copyright consultation process, and particularly with the need for balance, modernizing copyright to keep up with a fast-moving digital environment, and reflecting Canada to Canadians in an ocean of international content.

As both owners and users of copyright-protected materials, and as intermediaries between owners and users, broadcasters are in a unique position to understand and appreciate the need for balance in Canada's *Copyright Act*. It is essential that the law reflects the importance of protecting owners of copyright while ensuring that users have reasonable access to content. Both elements are necessary to a successful cultural sector, and Canadian copyright laws must ensure that a balance is struck.

Copyright law and policy must not hinder growth and business innovation by establishing or maintaining inefficient systems for clearing content for use on a growing number of platforms. The policy must foster a Canadian system that encourages the creation and exploitation of copyright works.

The CAB makes several recommendations to achieve these objectives. Paramount among these are:

1. There should be no liability for incidental digital music processing and storage employed to support a lawful broadcast (i.e. incidental copying); and
2. The system of collective administration of rights must be considered alongside with the legislative review. No copyright framework is complete without a fair and effective structure to administer copyright system.

This submission is intended to complement the oral submissions made by representatives of the Canadian private broadcasting sector throughout the summer at Roundtables and Town Hall meetings on copyright reform.

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I. INTRODUCTION

1. The CAB is the national voice of Canada's private broadcasters, representing the majority of Canadian programming services, including private radio and television stations, networks, specialty, pay and pay-per-view services. The goal of the CAB is to represent and advance the interests of Canada's private broadcasters in the social, cultural and economic fabric of the country.

2. The CAB is very pleased that the Government of Canada has undertaken a comprehensive consultation on copyright reform and provided this opportunity for public comments.

3. Copyright is a complex and multi-faceted issue that affects a diverse range of stakeholders, including small and large creators, individual consumers, and a variety of user groups. Broadcasters are in the unique position of being both users and owners of copyright-protected materials as well as intermediaries between the two and, as a result, have a great interest in ensuring the *Copyright Act* is balanced and fair. For broadcasters, copyright must be both an instrument to ensure reasonable payment for legitimate uses of creative materials, and a mechanism for ensuring access to cultural products.

4. Copyright must be modernized to allow broadcasters to keep up with a fast-moving digital environment, and to continue to play their essential role in reflecting Canada to Canadians in an ocean of international content.

A. Broadcasters are an integral part of the Canadian copyright system

5. The introduction of digital technologies has placed new stresses on copyright law and policy. The ease of replication, adaptation and transmission of works has created competing interests. Some business models have been challenged. Canada's broadcasting community continues to adapt to these changes. The broader business environment in which broadcasters operate is impacted by piracy, fragmentation of markets and the enormous escalating costs of both legitimate and illegitimate rights management. As the system continues to be impacted by the costs of infringement, the costs and complexity of legitimate rights management are increasing concurrently.

6. Broadcasters create enormous volumes of high value content, and add value in other owner's content by promoting it and exposing it to Canadian markets and by making direct payments for its use. Broadcasting fuels the awareness of copyright works that establishes opportunities for artists, producers and distributors on digital platforms. There was a time when Canadian broadcasters were gate keepers to a "walled garden" of electronic entertainment. Of course, in the last decade the system has changed and Canadians can now access electronic content through a great variety of technologies. However, Canadian broadcasting remains an important value creator for copyright works. Canadian broadcasters establish the foundation of copyright value in this country.

7. Canadian broadcasters have continued to serve their audiences in meaningful ways by providing creative and legitimate access to content. Broadcasters invest effort and money in delivering carefully selected and packaged programming, including music, with local content and community reflection. The process of selection and packaging promotes a diversity of voices and expression within Canadian society.

8. Broadcasters are also an integral part of the rapidly evolving value chain for content, as both licensees and licensors of copyright-protected works. Broadcasters are active participants as rights holders and as users before the Copyright Board of Canada, and in negotiated agreements, to determine fair and reasonable terms for use of creative content. TV and radio also generate revenues on which copyright payments are made – for example, broadcasters alone represent 80% of the domestic revenues of the Society of Composers, Authors and Music Publishers of Canada (SOCAN).

9. As important players within Canada's cultural fabric, broadcasters are essential to fulfilling the Government's policy objectives in a variety of ways. Some of the ongoing benefits that broadcasters provide include the following.

Generating revenue and impacting the economy

10. In 2007-08, private radio, conventional television, and pay/specialty television generated revenues of $6.65 billion. The $6.65 billion in revenues generates significant economic spinoffs – the indirect and induced impacts of private broadcasting on the Canadian economy. The Conference Board of Canada estimates that every dollar of direct GDP investment in culture (which includes broadcasting) generates indirect and induced impacts of $1.84. Consequently, private broadcasters' $6.65 billion in revenues, using the Conference Board multiplier, would represent $12.2 billion in overall economic impact in Canada.

11. According to the Department of Canadian Heritage, the music sector generates $3 billion in economic activity, of which commercial radio accounts for a large share (over 50%). Another 25% is derived from concerts and live music (gross revenues for live musical performances), 22.5% from recordings (total operating revenue of Canadian and foreign-controlled sound recording companies) and 4% is performing rights (music publishing).[1] This indicates the significant contribution that broadcasters continue to make to the Canadian economy and highlights why copyright must work to enable that contribution to continue going forward.

Contribution to the music industry

12. Broadcasters are not just passive conduits for the creative content they distribute to consumers. They add real value to the content through the manner in which it is programmed and packaged for distribution. By virtue of the business model – delivering creative content to audiences in innovative and interesting ways – the music and audio-visual content receives substantial and meaningful promotion. Radio airplay remains the primary method by which Canadians learn about new music. This promotional value represents a meaningful contribution to the success of artists. This value is also incremental to the direct payments made for the use of copyright works.

13. For example, between 1998/99 and 2007/08 private radio paid $569 million in copyright payments to SOCAN, the Neighbouring Rights Collective of Canada (NRCC), the Canadian Musical Reproduction Rights Agency (CMRRA) and Société du droit de reproduction des

[1] Department of Canadian Heritage, *Intersections: Navigating the Cultural Landscape. Cultural Affairs Sector 2007-08 Annual Report.*(published 2009).

auteurs, compositeurs et éditeurs au Canada (SODRAC) for the use of musical works. Similarly, between 2001/02 and 2007/08, private conventional television paid $317 million in copyright payments to SOCAN.[2]

14. In addition, in 2008, broadcasters contributed millions to the development of Canadian talent and to the creation and broadcast of Canadian content and talent. Radio broadcasters contributed $28.6 million to Canadian Content Development initiatives under the CRTC's applicable policies, while television broadcasters contributed $2.34 billion.[3]

15. Furthermore, in the seven years ending with the 2007-08 period, private radio paid $145 million in Canadian talent/content development payments to Factor, MusicAction, the Radio Starmaker Fund, Fonds Radiostar, and many other music-related initiatives, resulting from CRTC-approved transfers of ownership/control, CRTC licence renewals, and new licenses granted by the CRTC.[4]

16. In addition to these mandated contributions, broadcasters make contributions within their communities to local events and initiatives supporting the music industry, nurturing community interest in musical artists. For example, CAB radio members in 2007-08 supported such initiatives as the Alsek Music Festival, Yukon Women in Music, the Burlington Music Festival, the Nelson Music Festival, the Whitecourt Community Band Association, Peacefest (a music festival), the Limestone City Bluesfest, the E.A. Rawlinson Centre for the Performing Arts, the Ottawa Bluesfest, and others.[5]

17. The experience in television is similar to that in radio. Broadcasters pay tariffs, development fees and provide promotion to increase the value of copyright works.

Ensuring high levels of Canadian and local content on radio, television, and online

18. In Canada, licensed broadcasters bear a legal responsibility under the *Broadcasting Act* to promote Canadian cultural policy objectives. As such, the presence of Canadian Content on the radio or on television means that when stations and services make their programming available online, a significant representation of Canadian content is available, and can be seen worldwide, there as well.

[2] Data source for revenues, employment and copyright payments is Statistics Canada, special runs for CAB, August 2009, August 2008, Fall 2001 and Fall 2002. Data reflect actual payments made to these collectives, as reported to Statistics Canada and the CRTC.

[3] CRTC, Broadcasting Policy Monitoring Reports 2004 – 2007; and Communications Monitoring Reports, 2008 and 2009.

[4] *Ibid.*

[5] CAB, Corporate Social Responsibility Survey, summer 2008.

Generating jobs in communities across the country

19. In 2008, over 23,000 people worked in private broadcasting.

- In 2008, the private broadcasting sector paid $1.62 billion in salaries, wages and benefits.[6]

- Nearly 13,500 people were employed in private conventional television and pay/specialty television in 2007.[7] Private television (conventional and pay/specialty) spent about $1 billion on salaries, wages and benefits, compared to $1.1 billion spent on the same categories by film/video production, post-production and distribution firms in Canada (both Canadian and foreign-controlled).[8]

- 10,500 people were employed in private commercial radio in 2008.[9] Radio paid $612 million in salaries and other staff benefits in 2007, compared to some $145 million paid in salaries, wages and freelance fees paid by Canadian and foreign-controlled sound recording publishing, studio, production and distribution firms in 2007.[10]

20. It is essential that copyright reform decisions are made with an eye to ensuring the continuing health of the broadcasting sector, as broadcasters are integral to Canada's cultural fabric and a key player in Canada's economy. As creators of value within the system, broadcasters must be able to continue to innovate and evolve in order to deliver creative content to Canadians. Copyright reform must be undertaken with an intention to enhance this development and promotion, rather than restrict it. It follows that a weak broadcasting system would have a ripple effect on the other "feeder" copyright sectors and on the economy at large.

B. Principles for Copyright Reform

21. The CAB supports the following principles for copyright reform, which frame the more specific submissions in the sections that follow.

WIPO compliance is not the primary driver for reform

22. The CAB is pleased to see that these copyright consultations are broad-based and that the Government is open to understanding all copyright reform issues that are relevant to Canadian cultural industries and users of cultural products at this time. This is responsive to

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[6] Source: Statistics Canada, cat. 56-208-XWE, *Radio Broadcasting Industry 2008*.

[7] Source: Statistics Canada, cat. 56-207-XWE, *Television Broadcasting Industries 2008*. Data for 2007 are used for this comparison, since film/video industry data are available only to 2007.

[8] Source for film/video industry data: Statistics Canada, cat. 87-010-XWE, *Film, Television and Video Production 2007*.

[9] Source: Statistics Canada, cat. 56-208-XWE, *Radio Broadcasting Industry 2008*.

[10] Source for sound recording industry data: Statistics Canada cat. 87F008X, *Sound Recording and Music Publishing 2007*. Data for 2007 are used for this comparison, since sound recording industry data are available only to 2007.

the call by the CAB and others for the Government to consider issues beyond international treaty compliance.

23. While broadcasters recognize that the Government may be committed to ensuring consistency with international standards, it is essential that the Government continue to recognize that Canada's current needs to remain at the forefront of the digital economy are not limited to the contents of the *WIPO Copyright Treaty* (WCT) and the *WIPO Performances and Phonograms Treaty* (WPPT), signed by Canada in 1997. In this regard, the CAB views the following statement as a positive signal that the Government considers the current framework satisfies international requirements:

> *Canada and its international trading partners each have distinct copyright policies, laws and approaches for addressing the challenges and opportunities of the Internet. Canada's current framework provides strong intellectual property protections and Canadian copyright laws apply in the digital context, including on the Internet.* ***Moreover, Canada's regime for the protection and enforcement of intellectual property rights is fully consistent with its international obligations.***[11]

24. The WIPO Treaties were important instruments of international consensus at the time they were created. However, it has been almost 12 years since Canada signed these Treaties, and it is clear that technology has evolved in ways that were unimaginable at that time and, accordingly, the laws that apply to that technology must also evolve. The CAB agrees that international standards for intellectual property are important, particularly in an increasingly borderless digital world. However, we must ensure that any changes to the Canadian *Copyright Act* are reflective of the current domestic cultural, social, economic and technological environment, and of distinctly Canadian cultural priorities.

25. To that end, we believe that flexibility is needed to achieve the right balance for Canada. In any event, flexibility is contemplated by the WIPO Treaties themselves, which allow latitude to apply appropriate exceptions to and limitations on rights. The CAB is confident that the Government will seek to do what is in Canada's best interests, to ensure that Canadian copyright reforms are positioning Canada to resume its place as a leader in the global digital economy. We also urge the Government to approach the international forum strategically to ensure that Canadian domestic interests are protected. The reality is that a perfect copyright protection regime will ring hollow if it means that broadcasters no longer have a viable role to play.

Balance between users and creators is crucial

26. The concept of balance has been raised many times in these copyright consultations, by creators, users, and individual consumers alike. This sends a clear message that Canadians want balanced legislation: a *Copyright Act* that recognizes copyright is as much about ensuring access to cultural products as it is about providing protection for creators.

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[11] Government of Canada Copyright Consultations website, FAQ #4: http://copyright.econsultation.ca/topics-sujets/show-montrer/11), emphasis added.

27. Promoting balance between users and creators is particularly important for broadcasters, as they occupy both roles. Broadcasters use copyright protected materials in their programming. Sometimes the content they use is acquired and licensed from external creators, and sometimes it is created by the broadcasters themselves.

28. The delivery of the product through the broadcast signal represents the shift in focus from broadcaster as user, to broadcaster as owner of copyright protected materials. Regarding the latter, broadcasters have not only a protected right in their signals under the *Copyright Act*, but a broader interest in ensuring the protection of the works they create and licence for broadcast. They are therefore very interested in ensuring that protection for copyright continues to be meaningful.

29. In addition to being both users and creators of copyright, broadcasters are also intermediaries between other users and creators. In this role, as noted earlier in this submission, broadcasters are huge creators of value in copyright works, in terms of the way the content is packaged, promoted, and delivered to Canadians. Where previously, content delivered on a local radio station was temporary and transient because of the nature of the traditional over-the-air broadcasting technology, now, with the use of new technologies, much of that original content created by broadcasters is preserved and made available for access through podcasts and iPhone applications and other innovative delivery methods. Radio continues to be the primary source for new music, and the success of programs such as Corus Entertainment's *Explore Music* and the *Ongoing History of New Music with Alan Cross* demonstrate in a real way how broadcasters are adding value to the content for listeners and, in many instances, directing those same listeners to other legitimate platforms where they can engage with and, often, purchase music.

30. Broadcasters are in the unique position of experiencing copyright as users, creators and intermediaries between the two. They understand each perspective, and strive on a regular basis to achieve balance between those roles in their own businesses. For broadcasters to continue to play the important role in creating content, and adding value through packaging and delivering both their own and other content to Canadians, it is essential that copyright laws be balanced and fair, and be built on a sound policy framework that will foster opportunities for cultural success in the digital economy.

Users' rights are an integral part of copyright protection

31. As a member of the Business Coalition for Balanced Copyright (BCBC), the CAB endorses the Coalition's position regarding users' rights. If Canada is to truly modernize its copyright legislation, it must recognize the recent statement of principle of the Supreme Court of Canada relating to "users' rights" that must be given a "large and liberal" interpretation. This approach should include amending the *Act* to accommodate longstanding and accepted uses, as a number of Canada's major trading partners have already done.

32. In its decisions in *Théberge v. Galerie d'Art du Petit Champlain inc.*,[12] and *CCH Canadian Ltd. v. Law Society of Upper Canada*,[13] the Supreme Court emphasized that the very purpose of the *Act*

[12] [2002] 2 S.C.R. 336.

[13] [2004] 1 S.C.R. 339.

goes beyond protecting and compensating rights holders to include, as an integral part, the Act's public interest objectives in dissemination, access, and use. As the Court stated in *Théberge:*

> *The Copyright Act is usually presented as a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator...proper balance among these and other public policy objectives lies not only in recognizing the creator's rights but in giving due weight to their limited nature. In crassly economic terms it would be as inefficient to over compensate artists and authors for the right of reproduction as it would be self-defeating to under compensate them.*
>
> *Excessive control by holders of copyrights and other forms of intellectual property may … create practical obstacles to proper utilization.*

33. From these broad principles explaining balance in *Théberge*, the Court took a step further in *CCH*, holding that provisions previously considered "defences" were better characterized as users' rights. Given that copyright is widely recognized in Canada to be statutory law,[14] it is important that the statute recognize users' rights as well.

C. Broadcasters need reasonable copyright reform

34. The ability of broadcasters to continue to contribute to the digital economy, to continue to hold their own in the rapidly evolving value chain for content, and to continue to play their important role in Canada's cultural fabric depends in large part on fair and effective copyright laws. These laws must be made in Canada's domestic interests, must be balanced, and must recognize users' rights. This policy analysis must also be done in the context of other cultural policies such as that under the *Broadcasting Act*. The fact is that Canada's licensed broadcasters make a variety of contributions to the copyright creator community. It is important that reforms are made on the basis of sound policy, and that the policies supporting the introduction of amendments to the *Act* are applied equally to all relevant stakeholders. To this end, as discussed below, there should be no liability for incidental digital activities, and attention must be paid to streamlining the system of collective administration to ensure seamless access to content and fair and reasonable payment to content owners.

35. Broadcasters are an integral part of Canada's cultural fabric and they are a key component of the cultural value chain, promoting and distributing creative content to Canadians. It is essential that Canada's copyright laws are reformed in a manner that works with the cultural industries to facilitate, rather than limit, their success in the digital economy.

[14] *Compo Co. Ltd. v. Blue Crest Music et al.*, [1980] 1 S.C.R. 357

II. SUBMISSIONS ON SPECIFIC ISSUES

A. Limit liability for incidental digital activities

36. Bill C-61 sought to promote the principle of limiting or exempting liability for commonplace digital processes that do no harm. For example, it introduced specific amendments to provide exceptions for:

- Consumers, such as private copying of music to use on another device, and
- Network service operators to exempt copyright liability for certain digital activities, for example, caching.

37. The network services provision, designated as section 21 of Bill C-61, recognized some key principles that reflect a fair and balanced approach in defining the relationship between users and rights holders. In particular, it reflected the principle that "incidental acts" engaged in for purposes of efficiency are not copyright events.[15] From a broadcaster's perspective, the provision and the principle behind it represent a good starting point to address some of the major problems arising out of reproduction right provisions found in the existing *Copyright Act*.

38. The current copyright consultation process has opened up an excellent opportunity for further enhancement of the network services provision so that it can fulfill the Government's stated objectives more robustly.

39. In order to stand the test of time, an updated version of the network services provision has to be made more technologically and industry neutral. In the upcoming copyright bill, it is imperative that the Government include a provision that takes the language of the Bill C-61 network services provision and broadens it so that it can apply to all commercial entities that engage in incidental digital activities, including broadcasters.

40. As explained further below, doing so would be consistent with effective copyright policy: the distinction between copyright provisions intended to prevent infringement and provisions intended to create rights that can be licensed and monetized is relevant here.

41. One would note from reviewing the history of the existing broadcaster reproduction right provisions in the current *Copyright Act*, and the payments that flow from those provisions, the lack of a broad exception has led to absurd and costly consequences.

Why current provisions harm broadcasters

42. Broadcasters are subject to copyright liability for broadcasting music, and have paid for this use for almost a century. Similar to other industrial users of copyright such as Internet/network service providers, broadcasters also engage in temporary, technical and

[15] Section 21 of Bill C-61 provided that subject to certain conditions, activities related to the provision of services related to the operation of the Internet or another digital network did not give rise to copyright infringement.

incidental reproductions that are ancillary to the broadcast, and under the current regime they trigger a second layer of copyright liability.[16] For broadcasters, this has led to a mounting number of new copyright payments.

43. As both creators and users of copyright-protected materials, broadcasters are willing participants in a system that strives to compensate rights holders fairly for the use of their content. The multiple layers of liability arising from the reproduction right, however, create an unfair and unsustainable burden for broadcasters. The broadcasting industry's overall position is that broadcaster reproductions (i) are recordings made only to facilitate broadcast use of content that stations already pay for; (ii) hold no secondary commercial value to broadcasters; and (iii) do no harm to the rights holder. In fact these burdens will ultimately harm copyright owners if they inhibit broadcasters' ability to compete in a borderless digital economy.

44. Further to a number of studies and recommendations to Government over a number of years relating to incidental reproductions made in the context of broadcasting, the 1997 Bill C-32 amendments to the *Copyright Act* originally included complete exceptions for broadcasters to make copies without liability, to facilitate their broadcasts.

45. This type of broadcaster exception has been adopted by a large number of Canada's significant trading partners[17] to recognize the temporary, technical, and incidental nature of the reproductions made by broadcasters. A late amendment to Bill C-32, however, "overrode" and nullified the proposed broadcaster exception. The amendment negated the proposed benefit to broadcasters and has allowed various rights holders to make the multiple claims over and above claims for payment for the broadcast itself in recent years. This additional liability also places Canadian broadcasters at a competitive disadvantage in the global digital environment that they operate in.

46. Imagine a small radio broadcaster in Swift Current faced with monthly forms to complete and file with collectives for four separate reproduction right tariff payments, in addition to two tariffs for the "public performance", or broadcast itself (payable to the same groups of rights holders as the previous four tariffs), and at least one Internet tariff. The administrative burden on that small broadcaster is needlessly time-consuming, complex, and costly.

47. From this broadcaster's perspective, getting music to air is a single activity. As business operators, music is a single input to their operation, and should have a single, fixed and foreseeable payment attached. This is not the reality.

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[16] In addition to the two existing tariff payments to SOCAN and NRCC for the communication right, the reproduction right in the radio context has given rise to four separate tariffs and tariff proposals from six different collectives: CMRRA/SODRAC Inc., AVLA/SOPROQ, ArtistI and ACTRA-AFM.

[17] The UK, Germany and many other European countries, as well as Australia, New Zealand and Japan all have provisions in their domestic copyright legislation that recognize the temporary, technical and incidental nature of the reproductions made by broadcasters. See, for example, Australia *Copyright Act 1968* (Cth.), s.47; and United States, *Copyright Act*, 17 U.S.C. s. 112 (2007).

48. The unfair burden of the cost itself, moreover, is particularly striking considering that rights holders originally claimed that they would either not seek payment for the reproduction right, or seek only a nominal payment. This has now evolved into a multi-million dollar demand for payment representing almost 7% of revenues – over and above payments to the very same rights holders for the communication right, to broadcast the music.

49. This copyright burden is unwarranted, and causes broadcasters to make hard choices to divert resources away from their core activities – local reflection, news reporting, and community service – to ever-increasing and multiplying royalty payments.

50. Broadcasters need an effective exception from copyright liability for acts that are incidental, or ancillary, to broadcasting. The current subsections 30.8(8) and 30.9(6) in the *Copyright Act* are completely ineffective, and in any event do not reflect digital broadcast operations.

51. An effective exception would provide broadcasters with the means to operate without undue liability for what continue to be incidental copies made in support of the broadcasts which generate millions of dollars in annual communication right royalties to authors, composers, publishers, makers of sound recordings and performers in addition to the promotional value added by broadcasters.

An example of the implications of the reproduction right: how radio uses technology

52. Evolving technologies have led to significant changes in radio station operations in recent years. Broadcasters have been investing heavily in these over the past decade. In the past, radio stations would play music to air directly from records, tapes and compact discs. Over time, as the use of computer servers became increasingly pervasive in many industries including broadcasting, radio stations started transferring music from sources such as compact discs onto their servers in order to broadcast it. The first claims for payment for the reproduction right were made in this environment.

53. The use of digital file transfer technologies to deliver music content to radio stations has increased in recent years to the point where the vast majority of radio stations now use them. These music handling technologies reduce shipping and packaging costs for music labels while increasing the security and flexibility of the music delivery systems.

54. Despite this, rights holders have made increasing claims for reproduction right payments as the technology has evolved. As one example, record labels initiated and wholeheartedly support the digital file transfer process, in order to convey music to targeted radio stations in conjunction with the promotion of new releases. Despite actively using, supporting and promoting file transfer services, in 2007 the record labels sought their own tariff to seek further compensation pursuant to the reproduction right, based in large part on stations' use of these file transfer services. This claim was on top of the compensation they already receive for the broadcast, and in addition to the free promotion carried out by broadcasters. As a further example, in some instances, rights holders have gone as far as claiming payment from stations for copies made by third parties unconnected with the stations, for delivery of music to them.

Key concerns

55. Broadcasters' current reproduction right liability effectively taxes radio stations for being innovative and efficient in using technology to get music to listeners:

    a. **Broadcasters already pay for the right to play music** and are not disputing the need to compensate rights holders. However, the reproduction right tariffs for commercial radio alone now represent four additional payments (and counting) to use music in a broadcast. The multiplicity of payments represents an unfair burden by any standard.

    b. Making these reproductions only **facilitates the broadcasting of the music broadcasters have already paid to use**. No new use is made of the music, radio makes no additional revenues when they make the reproductions and, in fact, radio makes significant capital investment in the technology and in dedicated staff.

    c. The types of reproduction engaged in by broadcasters **do no harm to the rights holder**: they do not encroach on the rights holders' content exploitation markets in any way. To the contrary, the use of digital music transfer systems serves to cut costs for the music labels. Broadcasters are no different from consumers or digital network operators when they use technology to make digital music files broadcast-ready: the use is ancillary to an efficient technical process.

    d. Over the course of many years, **Government had promised the broadcasting industry that it would provide true exceptions from copyright liability** for these types of processes that involve "technical reproductions." Canadian broadcasters are asking for conditions that will allow them to be competitive with other countries in the borderless new media environment.

56. Given the above, together with the principles defining balance and users' rights referenced in Part I of this submission, it is clear that an exception is warranted for the following reasons:

    a. The same rights holders are already being compensated fairly for their works.

    b. Incidental reproductions are not sold, or shared illegally, and do no harm to the market for the rights holders' work.

    c. The user of an incidental copy is not gaining any discrete or significant value from the use of the reproduction right.

57. The proposed exception will not undermine the value of the integrity of the work and will provide the broadcasting industry with competitive conditions. The proposed exempted activity – engaging in digital processing to support a lawful broadcast – is simply an intermediary practical step in the course of a legitimate industrial use activity, for which creators are already being compensated.

58. A concluding point on the policy purpose behind the reproduction right must be made. The distinction between copyright provisions intended to prevent infringement and provisions intended to create rights that can be licensed and monetized should be carefully considered. If the intention of maintaining a reproduction right relating to incidental copies made during digital communications is to ensure that copyright owners have sufficient tools to prevent infringing uses of their works, then tying the exception to an otherwise lawful use of the content – i.e. the broadcast – ensures continued control by the owner, without adding liability for an intermediate copying activity that has no independent economic value. The value of a work arises at the point of its consumption (for example, when it is broadcast), not in its preliminary processing.

CAB Position

59. Broadcasters have evolved in step with other technology-based industries in Canada, and require amendments to the *Copyright Act* to support their vital role as new media players and producers of Canadian content in a digital economy.

60. There should be no liability for incidental digital music processing and storage employed to support a lawful broadcast.

61. Such an exception can be tied to other proposed exceptions from liability for incidental digital reproductions and will not impact the fact that broadcasters will continue to pay communication rights royalties to rights holders.

62. The network services provision of Bill C-61 is an example of the type of proposed exception that a broadcaster exception could be tied to. To broaden its application, the provision should adopt language that is more technologically neutral:

- **a. "caching" refers to a technology which may become obsolete long before the *Act* is amended again.**
- **b. The provision should also be industry neutral, to allow new media business models to emerge without undue liability attached to technological processes that have no independent economic significance, and whose sole purpose is to enable a licensed use of the work or other subject matter.**

B. Rights Clearance Issues

Background

63. As previously stated, broadcasters are both owners and users of copyright-protected materials, and intermediaries between owners and users. They play a crucial role in the value network for cultural products in Canada, which includes the creation, aggregation and distribution of content for Canadians. Rights clearance issues have never been more important for broadcasters in fulfilling this role. At the same time as broadcasters have been actively expanding their digital presence on new platforms, rights clearance issues have become more complex for Canadian users.

64. There are two distinct but related issues: the negotiated clearance of rights on digital platforms, and the collective administration of copyright. Each gives rise to significant challenges for broadcasters including unfair levels of liability, lack of efficiencies, excessive transaction costs, and needless decisions to delay or refrain from using copyright materials on different platforms.

65. There are two mounting concerns in particular. The first is the ability to showcase Canadian content without undue rights clearance obstacles. A major central Canadian broadcaster faced this head-on when it attempted to launch a new website with the goal of celebrating and providing a new platform for Canadian artists' music. The complexity of rights clearance obstacles effectively killed this initiative, resulting in lost opportunities and exposure for Canadian artists. Canadian broadcasters and their audiences deserve a better system that will facilitate access to Canadian content, not create road blocks.

66. The second concern relates to impediments to the use of new technologies. Many radio stations across the country faced this when they delayed simulcasting their signals online for years, due to uncertainty around costs and terms. One part of the puzzle fell into place when the Copyright Board of Canada issued an important, long-awaited Internet tariff decision last year for 1996-2006; however a number of other elements of copyright liability for online uses of music remain unresolved. Broadcasters want to be online, and must be to remain relevant and competitive. Again, rights clearance issues must not stand in their way.

67. Smart regulation and associated frameworks are a priority of the Government and should be applied to rights clearance. The Government's economic plan, *Advantage Canada,*[18] makes an important commitment to reform and streamline Canada's regulatory regime guided by a principle-based legislative framework. The *Cabinet Directive on Streamlining Regulation*[19] specifies the need to "**limit the cumulative administrative burden and impose the least possible cost on Canadians and businesses** that is necessary to achieve the intended policy objectives." More recently, the Government announced in the News Release accompanying Bill C-61 that one of the principles motivating the development of the proposed changes to the *Copyright Act* is that the Act "must provide **clear, predictable and fair rules** to allow Canadians to derive benefits from their creations".[20]

68. Before addressing the potential solutions to remedy systemic weaknesses in rights clearance, we describe and explain the two issues: the negotiated clearance of rights on digital platforms, and the collective administration of copyright.

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[18] http://www.fin.gc.ca/ec2006/plan/ecpam-eng.asp

[19] http://www.regulation.gc.ca/directive/directive01-eng.asp; emphasis added. See also, *Compete to Win: Final Report June 2008*, Competition Policy Review Panel Report, http://www.ic.gc.ca/eic/site/cprp-gepmc.nsf/eng/h_00040.html at p. 92.

[20] http://www.ic.gc.ca/eic/site/ic1.nsf/eng/04204.html; emphasis added.

Negotiated clearance of rights on digital platforms

69. In addition to the rights administered through copyright collectives (addressed below), there is also an emerging rights marketplace coincident with new and emerging digital distribution platforms. Complexity of the rights clearance process in the digital environment is a real challenge for broadcasters and other users seeking to distribute content on multiple platforms.

70. Advances in digital technology have multiplied the opportunities for content creators to exploit their rights. Rather than having one or two contracts for TV rights, content creators now recognize that the more ways they can divide up the rights, the more "sales" they can make and consequently, the more money they can get paid – ancillary rights in addition to traditional TV rights. This is a problem because it slows down the process of rights clearance and, consequently, the ability of broadcasters and other users to push content through multiple (often digital) distribution platforms while the content is in demand and thus more valuable.

71. The reality of this new and evolving rights marketplace is that the success of the Canadian broadcasting system in the global digital economy may increasingly depend on Canadian broadcasters' access to multi-platform rights. In the online environment, broadcasters are competing on a global scale and their ability to provide content in innovative and competitive ways cannot be held back by copyright clearance. Broadcasters recognize the importance of reasonable compensation for using copyright-protected works, but do not believe that each new development in the way they use works should necessarily give rise to a new payment. This is tantamount to taxing innovation. Users of copyright content, both consumers and the broadcasting industry, as well as rights holders themselves who want to encourage the use of their works for fair compensation, need a policy framework that supports efficient clearance of all rights.[21]

Collective administration of copyright

72. Canada's copyright regime is administratively complex, slow, inefficient, and costly. There are no fewer than 37 copyright collectives operating in Canada. These collectives overlap in terms of the rights they hold and the claims they make. This contributes to significant and needless complexities in proceedings before the Copyright Board of Canada, which in turn causes delays and lack of business certainty around liabilities for users.

73. Moreover, the regime gives rise to unfair levels of liability. Copyright payments made to collectives are increasing at a pace that greatly exceeds the rate of growth of broadcasters' revenues or expenses. Multiple payments contribute to the problem of unforeseeable

[21] For example, in the Internet environment, broadcasters may be subject to three separate copyright tariffs as well as direct rights clearances for certain uses of music. One collective continues to propose a tariff based on uses of music, meaning that a website that has podcasts, audio webcasts, downloads, video content and games could be subject to five separate sub-tariffs, each with requiring separate accounting and payments.

liability, and an unsustainable burden. The administrative cost of this also establishes a great burden on both users and the Government of Canada.

74. Frameworks exist in the current *Copyright Act* that provide models for reforming the collective administration system. Where rights are introduced or amended, legislators should consider the following examples of provisions to streamline the tariff process:

a. Retransmission regime – the *Act* specifically allows the Copyright Board to set a single tariff and divide the total royalty liability among a number of collectives (including broadcasters). This legislated "single use, single payment" structure is not available for other rights, and should be.

b. Private copying regime – the Board may designate a collecting body to collect for a number of rights holders. This has meant that the Canadian Private Copying Collective is the single collective, putting forward a single tariff proposal on behalf of a number of collectives. This single collective model is not available for other rights, and should be.

c. Sound recording remuneration right for performing right – Single payment for makers of sound recordings (the labels) and performers must be shared 50/50. This has meant that NRCC puts forward, and collects on, a single tariff on behalf of five labels' and performers' collectives.

The Copyright Board's role

75. The Copyright Board of Canada is described as "an economic regulatory body empowered to establish, either mandatorily or at the request of an interested party, the royalties to be paid for the use of copyrighted works, when the administration of such copyright is entrusted to a collective-administration society."[22]

76. The Copyright Board occupies an important position within the framework of collective administration. Its significant role should be considered alongside the various contemplated legislative amendments, to ensure that the Government fully achieves its objective of ensuring "clear, predictable and fair rules" within copyright. This is important for all stakeholders – collective societies and user groups alike – including individual Canadians who are increasingly participating in proceedings before the Board, particularly in cases where digital issues (for example, private copying, online uses of copyrighted material) are at issue.

77. As a more practical matter, it should not be overlooked that the Government is actively reviewing *Copyright Act* amendments that will add both to the responsibilities of the Board and the complexity of its mandate, as new rights are added and others expanded.

78. As previously stated, copyright rules – including the valuation and certification of licences – must not unduly complicate, delay, or create unreasonable costs associated with the

[22] Copyright Board website at http://www.cb-cda.gc.ca/about-apropos/mandate-mandat-e.html.

clearance of content for use on a growing number of platforms. The Copyright Board and the system of collective administration are established by Part VII of the *Copyright Act*. In reviewing the workings of the *Act*, the Government should not miss the opportunity to ensure that the Copyright Board, in its duty to establish fair tariffs, can be efficient and work within a legislative framework allowing it to provide "clear, predictable and fair rules." The success of Canada's digital economy in cultural products demands no less.

The Copyright Board's increasing responsibilities

79. The Copyright Board's responsibilities have increased significantly in recent years as a result of the continually growing number of rights created and of tariffs that it must now certify. This is partly a function of the Board's increased mandate arising from the 1997 Bill C-32 amendments to the *Copyright Act*.

80. Since that time, the Board has become responsible for the certification of tariffs that are estimated to be worth half a billion dollars a year, for an ever-growing list of uses of copyright protected works. Matters before the Board now require it to deal with complex social, cultural, demographic and technological issues, relating to communications technology, Internet uses of music, blank CDs and other audio supports, and digital rights management. Moreover, Bill C-61 would have affected the Board's mandate by expanding certain rights, and by introducing a number of provisions (for example, relating to technological protection measures and the "making available" right) that will be subject to first-line interpretation by it.

81. Under the *Copyright Act*, the Board's mandate is to establish "fair and equitable" royalties to be paid for the use of copyrighted works. Over time, the Board has developed various principles for, or approaches to, valuation of copyright-protected works which include setting ratios between the value of the reproduction and the communication right, the value of efficiencies arising from the use of the right, and the user's ability to pay.

82. Setting the terms, including royalties, for the use of a work is the final step in the exercise of copyright in relation to that work. That step should not be overlooked as a consideration in the review of the workings of the *Act*. This is particularly the case given the growing value and scope of the exercise of the Board's mandate discussed earlier, as well as the complexities associated with the use of content on digital platforms, multiplying rights and associated licensing issues.

The Copyright Board's ability to streamline collective administration

83. In his speech at the 2008 Broadcasting Invitational Summit (June 20, 2008), Copyright Board Chairman Justice William J. Vancise said the following in relation to the way the Board operates within the framework of the *Copyright Act*:

> *Let me say a word about the value of rights.* […] *The broadcasters contend that the Board does not take into account that they have to pay for multiple rights. The broadcasters contend that the Board does not take into account that they have to pay for multiple rights and as a result pay disproportionally higher fees.*

We partially agree, but there are reasons. First, section 90 of the Copyright Act provides that the creation of neighbouring rights could not be used to justify lower rates for incumbent rights holders. Second, the Board considers that when Parliament creates a right it must be worth something.[23] Third, the Board does however consider the ability to pay which can be used to reduce the amount that would otherwise be a fair and equitable tariff. (http://www.cb-cda.gc.ca/about-apropos/speeches-discours/20080620.pdf)

84. The Board has taken important steps to streamline the process of collective administration, taking into consideration the needs of all stakeholders. One example affecting broadcasters is the consolidation of the proceeding to consider five tariff proposals filed in respect of commercial radio for 2008 and future years.[24]

85. However, as suggested above, the Board remains at all times subject to its legislative framework. The legislation does not consistently or fully allow for the type of efficiencies that are required now. Given the continued expansion of rights in the *Act*, and the increasingly dynamic use of copyright-protected works on new platforms, the CAB submits that a close review of rights clearance must be undertaken, to complement the ongoing legislative exercise. The overall goal would be to ensure that the system of collective administration is as modern and forward-looking as the rest of the *Act*'s provisions.

86. The two points referenced in the passage above – section 90 of the *Copyright Act,* which is inconsistent with similar provisions in other countries, and the premise that "when Parliament creates a right it must be worth something" – should be part of this review.

Shifting focus to users in collective administration process

87. The current system of tariff certification places a disproportionate burden on copyright users. The first area of difficulty arises from the lack of effective limitations on the formation and operation of collective societies. The second relates to the tariff process before the Board, as required by the *Copyright Act*.

88. The definition of "collective society" under the *Copyright Act* is very broad, and has permitted the formation of no fewer than 37 collectives in Canada. Many of these collectives have overlapping mandates. For example, multiple collectives often represent the same rights holders for different rights, and there are also instances where multiple collectives represent

[23] The CAB's perspective is that a right to protect against unlawful use does not necessarily establish an economic value. For example, a new right can establish a cause of action to enforce a prior negotiated right and therefore can be created to solve a problem such as that posed by privity of contract in performer – producer relations. See, for context, A.A. Keyes and C. Brunet, *Copyright in Canada: Proposals for a Revision of the Law* (Ottawa: Consumer and Corporate Affairs Canada, 1977) p.113-117. It does not follow that this should also create a right to a tariff payment under a collective regime. The complex nature of whether and how to exercise some rights through the collective mechanism is a necessary consideration, particularly for copyright reform.

[24] Since that time two more collectives have come forward with a further tariff proposal in respect of commercial radio – this was not part of the consolidated proceeding. This is a good example of the unpredictable layering of collective and corresponding inability for broadcasters to make reliable financial plans for their copyright liability.

groups of rights holders in the same category for identical rights.[25] This has led to serious inefficiencies, multiple layers of payments, and uncertainties for all stakeholders.

89. Furthermore, the provisions of the *Copyright Act* establish a process under which rights holders unilaterally trigger a Copyright Board process. This creates an automatic legal burden on users to reply within a 60 day time frame, often on a yearly basis, and then to organize a case over a specific time frame. Collectives do not have to pre-clear their entitlement to the tariff. Collectives also do not have to justify the rates they seek up front by economic or other means (including measuring impact on the industry). Collectives set the proposed tariff terms and therefore frame the debate. As a function of the foregoing, the interrogatory process is unduly demanding and skewed in favour of collectives, as they have the ability to probe into the users' sensitive business information in support of a tariff proposal they have not yet been required to justify.

CAB Position

Collective Administration – General

90. The new copyright framework (amendments to the *Act*) cannot be effectively implemented without clear parameters on how to value and administer the existing and new rights.

91. In the fast-paced digital environment, broadcasters and other users of digital content need clearer and more predictable rules for royalty payments. At a minimum, consideration must be given to how any new legislative provisions granting or amending rights are to be administered and/or cleared for use in the digital environment. Where rights are granted or amended in the *Copyright Act*, associated measures must be introduced to streamline their administration. For example, where a new right is introduced, its administration and payment should be included in an existing right to avoid "layering" of rights.

92. New efficiencies must be found around the Board's processes at a time when copyright issues are becoming increasingly complex, to streamline and eliminate duplication in collective administration of the various rights under the *Copyright Act,* including those for use on new media platforms. To identify efficiencies, the Copyright Board could be directed under section 66.8 of the *Copyright Act*[26] to conduct a study relating to collective administration of copyright, including a review of the collective administration, the impact of the current system on all the stakeholders, and the role of the Board in managing the system.

[25] For example, performers are represented by NRCC (which is comprised of multiple subsidiary collectives including AVLA, SOPROQ, ArtistI, ACTRA and AFM) for the communication right, and are represented individually by ArtistI, ACTRA and AFM for the reproduction right. AVLA/SOPROQ also represents the record labels for the reproduction right. Similarly, authors and composers are represented both by SOCAN and CSI.

[26] Section 66.8 of the *Copyright Act* provides that the Board "shall conduct such studies with respect to the exercise of its powers as are requested by the Minister [of Industry]."

93. The Government must recognize the complexity of copyright clearance in all its forms and develop a system that would facilitate the use of copyright-protected works in the digital environment. An independent review is needed of both collective administration and other rights clearance issues. The review would support the establishment of a copyright clearance system that would:

- **create efficiencies for collective associations and users and ensure innovation on digital platforms;**
- **allow the broadcasting industry to be more competitive in the multi platform global digital environment;**
- **encourage the use of Canadian works on digital platforms;**
- **provide fair compensation based on the value of the use of the copyrighted work; and**
- **complement the current legislative review: no copyright framework is complete without a fair and effective structure to administer copyright valuation and payments.**

94. One potential model is the 2005 Telecommunications Policy Review panel.[27]

<u>Collective Administration – Tariff Processes before the Copyright Board</u>

95. Amend the *Copyright Act* to (i) require that collectives be subject to certification, providing a "gatekeeper" function for the formation of a collective from the outset, and (ii) empower the Board to review and supervise collectives' functions and operations to ensure that rights are administered in the most rational and streamlined manner.

96. Allow users to table their own tariff proposals.

97. Require collectives to provide economic justification for proposed tariff rates up front.

98. Eliminate the possibility to file new tariffs on a yearly basis.

99. Limit the interrogatory process and implement feedback mechanisms to ensure that information requested is actually required for the proceeding.

C. Liability for Sound Recordings

100. The tariff burden faced by radio broadcasters has been growing at an alarming rate in recent years, with the introduction of additional rights, particularly those associated with the use of sound recordings. While this growing burden is applicable to all sectors of broadcasting, it is most pronounced in the radio sector. Since 1995, the copyright burden radio broadcasters face has ballooned from just a single payment to authors and composers worth $22 million,

[27] http://www.ic.gc.ca/eic/site/ic1.nsf/eng/02281.html.

to the current situation where radio faces potential payments to eight different collective societies amounting to over $220 million. Of those eight collectives, six represent rights in the sound recordings.

101. The potential introduction of additional rights for performers and makers of sound recordings would add to the layers of copyright complexity, inefficiencies and liability, and would signify a shift in Canadian copyright law more firmly towards creator entitlements and away from reasonable user counterbalances.

Performers' reproduction right

102. There has been discussion regarding WIPO compliance about "clarifying" the reproduction right for performers. The *Status Report on Copyright Reform* submitted to the Standing Committee on Canadian Heritage by the Ministers of Canadian Heritage and Industry Canada in March 2004 indicated that the *Copyright Act* contains an exclusive reproduction right for performers, but suggested that this right is limited and, therefore, is not in accordance with the WPPT.

103. Similarly, in both Bill C-60 in 2005 and Bill C-61 in 2007 the Government took steps to address the performers' reproduction right, based on its understanding of WPPT requirements. In particular, the Government announced with Bill C-61 that it was "clarifying" that performers' reproduction right exists separate and apart from the labels'. The notion that the right in section 15 needed to be clarified, speaks to the fact that a reproduction right exists in the *Act* as it is currently worded. The CAB submits that the existing right is sufficient to meet the requirements for WIPO compliance.

104. The WPPT creates a reproduction right for performers in Article 7, which states: "Performers shall enjoy the exclusive right of authorizing the direct or indirect reproduction of their performances fixed in phonograms, in any manner or form." In an Agreed Statement,[28] WIPO indicated that the provision is to "fully apply in the digital environment, in particular to the use of performances and phonograms in digital form" and that "[i]t is understood that the storage of a protected performance or phonogram in digital form in an electronic medium constitutes a reproduction within the meaning of these Articles."

105. Based on the language of Article 7, it is clear that *any* reproduction right for performers would satisfy the requirements of the Treaty, if such a right was applicable in the digital environment. The existing reproduction right in the *Copyright Act* that provides protection for performers in section 15 is sufficient to ensure compliance. It guides industry practice, and provides control by the performer over her performance, subject to certain conditions.

[28] Agreed Statement Concerning WPPT adopted by the Diplomatic Conference on December 20, 1996, <http://www.wipo.int/treaties/en/ip/wppt/statements.html>.

106. In addition, the absence of a reproduction right for performers in the U.S. legislation[29] suggests that Article 7 is merely directory and that there are no outright consequences, insofar as meeting international obligations, for failing to directly incorporate a matching provision into a country's domestic legislation. The CAB submits that the existing section 15 is sufficient to meet Canada's international obligations on this matter and recommends that the Government take no steps to amend or clarify section 15.

CAB Position

107. Broadcasters support Canadian performers through ongoing financial contributions to Factor, MusicAction, the Radio Starmaker Fund, Fonds Radiostar, and other Canadian Content Development initiatives, as well as through sustained and innovative on-air promotion.

108. Broadcasters have long held the position that performers' rights should be a matter of contract with the record labels. The CAB has opposed this potential additional layer of liability. Moreover, as noted in the section on incidental liability, there should in any event be no liability for incidental digital music processing and storage employed to support a lawful broadcast.

109. It is clear that it was not the intention of the WPPT to impose rigid guidelines on how to implement the performers' reproduction right. Canada already has a limited right.

110. Canada need not and should not expand the performers' reproduction right.

Equitable remuneration for sound recordings (communication right)

111. Broadcasters have long been opposed to paying copyright royalties for sound recordings (to record labels and performers) arguing that radio's access to the sound recordings and the music industry's benefit of free promotion represent a fair value exchange.

112. Despite broadcasters' strong opposition, neighbouring rights were introduced into the *Copyright Act* in 1997, bringing with them new royalties payable to labels and performers. The impact was alleviated somewhat by the application of a special rate of $100 on the first $1.25 million in revenues,[30] regardless of any rate sought by the collectives or certified by the Copyright Board.

113. It is also important to note that stations pay on a repertoire that is reduced by 50%: payments are not made on U.S. repertoire, because the U.S. does not recognize neighbouring rights. Under section 20 of the *Copyright Act*, the right to remuneration for sound recordings

[29] The U.S. legislation has been accepted by WIPO as implementing the provisions of the WPPT despite the absence of an express reproduction right for performers. The American position is that this right is a matter of "work-for-hire", i.e. performer/label contract.

[30] Section 68.1(1) of the *Copyright Act*

extends to rightsholders attached or connected to Rome Convention countries; the U.S. is not a Rome Convention country. Other countries can be added to the list of receiving countries if they provide reciprocal rights – the U.S. currently does not.

114. There are two inter-related circumstances which could affect the above situation. First, the potential passage of the U.S. *Performance Rights Act* would represent a significant change in the U.S. position, and introduce payments by U.S. radio stations to labels and performers. Second, WPPT ratification requires equitable remuneration for the broadcast of sound recordings. The U.S. has ratified WPPT, but expressly excluded this remuneration. This situation, and the potential interplay with the Canadian *Copyright Act*,[31] can impact on the entitlement of U.S. and other foreign rights holders to payment by Canadian stations.

115. If the U.S. passes the *Performance Rights Act*, there may be pressure to have payments by Canadian stations flow to U.S. labels and performers. The CAB cautions the Government that extending national treatment to the U.S. on this issue would result in a substantial outflow of royalty payments to non-Canadians.

CAB Position

116. CAB supports the opposition by American radio stations to the introduction of a U.S. performing right for sound recordings.

117. Canadian broadcasters must not shoulder any additional liability for sound recordings. This is particularly the case where proposed new payments leave Canada and represent no additional support for Canadian artists.

118. The existing special rate for <u>Canadian</u> neighbouring rights payments must be maintained in section 68.1 of the *Copyright Act*.

III. SUBMISSIONS ON OTHER ISSUES

119. The foregoing submissions represent the CAB's priority issues for copyright reform. Given broadcasters' role as creators and users of copyright-protected works, however, broadcaster interests in various aspects of copyright legislation, and in ways of achieving balance, are quite broad. The CAB therefore makes the following submissions as areas of continued interest.

A. Fair Dealing

120. Since the Supreme Court of Canada's 2004 decision in *CCH Canadian Ltd. v. Law Society of Upper Canada*, fair dealing is understood to be a user's right under the *Copyright Act*; as long as the act in question satisfies the test in CCH – that, on balance, the factors enumerated in the case indicate that the dealing is fair – the user is free from copyright liability.

[31] See section 20 of the *Copyright Act,* which sets out conditions for the application of the right to remuneration for the performance in public or communication by telecommunication of a sound recording.

121. Particular components of the fair dealing provisions that are relevant for broadcasters are news reporting and parody. It is important that broadcasters are able to rely on the fair dealing provisions for fair uses of copyright-protected works in news reporting and other elements of the broadcast. To that end, the CAB supports the position of the BCBC, of which it is a member, that the Government should apply a large and liberal approach to the fair dealing provisions and adopt a more flexible approach that is illustrative rather than exhaustive.

122. Any users' rights in copyright law are of interest to broadcasters, as commercial users of copyright-protected material. From a policy perspective, it is important to ensure that users continue to be effectively recognized under the *Act*. As with all users' rights or exceptions to infringement, the introduction of protection for TMs must not erect a barrier to reliance on these exceptions. Any anti-circumvention provisions must not supersede the fair dealing provisions.

CAB Position

123. CAB supports the position of the BCBC that the Government should adopt a more flexible approach to fair dealing that is illustrative rather than exhaustive.

B. Private Copying and the Broadcasting Industry

124. The Private Copying Levy compensates authors, performers and producers by imposing a levy on various types of blank audio recording media and is administered by the CPCC. Broadcasters, as industrial users, take no position on amendments to the private copying regime as it applies to individual private users.

125. Broadcasters do not directly pay this levy. However, as users of blank audio media, broadcasters may face "pass through" costs in the form of increased prices for media. Broadcasters may participate in what is known as the "zero-rated" scheme, which allows broadcasters to buy directly from participating importers/manufacturers/ distributors and pay no levy amount.

CAB Position

126. The *Copyright Act* should be clarified to state that the levy imposed on blank recording media applies to private copying by consumers only, and therefore provide broadcasters with a clear exemption from the levy in the *Act*.

IV. REVIEW OF KEY RECOMMENDATIONS

127. To ensure broadcasters can continue to work within the copyright regime, be competitive in the global economy and add value to Canada's cultural fabric, and to assist the Government in achieving its stated objectives, the CAB has the following recommendations for copyright reform:

1. There should be no liability for incidental digital music processing and storage employed to support a lawful broadcast.

2. Copyright clearance should be streamlined. To this end:

    a. There should be a comprehensive review of the collective administration regime to examine the impact of the current system on all the stakeholders, and the role of the Board in managing the system. This review would support the establishment of a copyright clearance system that would be more efficient, and encourage innovation under competitive conditions in digital technologies.

    b. The *Act* should be amended to (i) require that collectives be subject to certification, providing a "gatekeeper" function for the formation of a collective from the outset, and (ii) empower the Board to review and supervise collectives' functions and operations to ensure that rights are administered in the most rational and streamlined manner.

3. Canada need not and should not expand the performers' reproduction right.

4. The existing special rate for Canadian neighbouring rights payments must be maintained in section 68.1 of the *Copyright Act*.

5. The Government should broaden the existing fair dealing rights in the *Act* by adopting a more flexible approach that is illustrative rather than exhaustive.

6. The *Copyright Act* should be clarified to state that the levy imposed on blank recording media applies to private copying by consumers only, and provide broadcasters with a clear exemption from the levy in the *Act*.