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Canadian
Association of
Broadcasters

L'Association
canadienne des
radiodiffuseurs

House of Commons Standing Committee on Industry, Science and Technology
House of Commons
Ottawa, Canada
K1A 0A6

Re: Brief of the Canadian Association of Broadcasters (CAB)

The Canadian Association of Broadcasters (CAB) is the national voice of Canada's private broadcasters, representing the vast 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. The CAB is pleased to submit these comments on intellectual property.

The CAB is pleased to have the opportunity to present this brief to the House of Commons Standing Committee on Industry, Science and Technology, for the purposes of the Committee's study into Canadian science and technology. The CAB's brief focuses on the theme of intellectual property, and specifically, the interrelation of broadcast technology and Canada's copyright framework.

Background – Broadcasters' Operations and Copyright Liability

Local radio stations in Canada have been paying copyright fees to broadcast music for over 80 years, and over those years their broadcast technology has changed and advanced. The shift to digital technologies in particular has become increasingly relevant to stations' copyright liability.

Until 1997, radio stations made a single copyright payment for the broadcast: they paid, and continue to pay today, authors and composers for the right to broadcast music to the communities they serve. Beginning in 1997, radio stations were required to make a second payment, to performers and makers of sound recordings, again, for the broadcast. These payments were not specific to stations' technology or operations.

This picture changed in 1998, and radio stations' technology and operations became directly relevant to their copyright liability. In that year, a copyright collective (Société du droit de reproduction des auteurs, compositeurs et éditeurs au Canada) representing a group of rightsholders came forward to claim payment from radio stations for the reproduction right, that is, the copies stations make in support of the broadcast. In subsequent years, four other collectives have made a similar claim for payment for the reproduction right.

Further to a number of studies and recommendations to government over a number of years relating to ephemeral and transfer of format exceptions or rights, amendments to Canada's *Copyright Act* in Bill C-32 (1997) originally included complete exceptions for broadcasters to make copies without liability, to facilitate their broadcasts. This type of broadcaster exception mirrored the ones adopted in a number of other countries (please see Appendix A for further detail) to recognize the temporary, technical, and incidental nature of the reproductions made by broadcasters. A last-minute amendment to Bill C-32 "overrode" the exception, nullifying the proposed benefit to broadcasters. The amendment has, since then, allowed various rightsholders to make multiple claims, over and above their claims for payment for the broadcast itself.

The broadcasting industry's overall position is that station reproductions:

- are temporary recordings made only to facilitate broadcast use of programming that stations already pay for;
- hold no secondary commercial value to broadcasters; and
- do no harm to the rights holder.

The relevance of radio stations' technology and operations to this position is explained in more detail below.

Technology

Evolving technologies have led to significant changes in radio station operations in recent years. 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 copyright claims were made in this environment. More recently, the use of digital file transfer technologies to deliver music content to radio stations has increased to the point where most radio stations now obtain most of their music via an online service.

Rightsholders' claims for the reproduction right have increased in amount and in number as the technology has evolved. They have even increased in scope – one rightsholder group has gone so far as to claim payment from stations for copies made by third parties unconnected with the stations, for delivery of music to them.

Recommendation

Broadcasters seek an effective exception to reproduction right liability. Such an exception would provide broadcasters with the means to operate without liability for what were in the past, and continue to be in the new technological environment, incidental copies in support of the broadcast. The broadcast has always been the radio station's *raison d'être*, and is the revenue-generating basis for millions of dollars in annual communication right royalties to authors, composers, publishers, makers of sound recordings and performers.

We therefore respectfully make the following recommendation for the Committee's consideration:

THAT the House of Commons Standing Committee on Industry, Science and Technology recommend to the Government of Canada that sections 30.8 and 30.9 of the *Copyright Act* be amended to provide the real exceptions promised to the Canadian broadcast industry since the 1980s.

We would be pleased to provide further information to the Committee as required.

Sincerely,

Original signed by

Glenn O'Farrell
President & CEO



Appendix A

International Reproduction Rights & Ephemeral Exceptions

A review of the domestic copyright legislation of 19 countries, including the European Union's Copyright Directive, has been conducted. Of these, 14 contain an exception to the reproduction right for broadcasters, while five do not. The existing exceptions are of varying duration and are accompanied by varying limitations. They have been organized accordingly.

Please note that this represents our findings with respect to the state of the law in other countries at a specific point in time. Domestic legislation is subject to change and thus may not always be exactly reflected in this document.

Key Points for Consideration:

1. Canada has one of the most restrictive regimes. It is in the shortest duration bracket (28 days).
2. There are 10 jurisdictions that have a longer time period for the exception, and only four with an equivalent.
3. Canada has the highest number of limitations (5) to its exception. The next highest is three, for Japan, Germany, the Netherlands, and South Africa.
4. Canada is the only jurisdiction where the existence of a collective vitiates the exception.

Exception	No Exception
<ul style="list-style-type: none"> • Australia • Canada • Denmark • European Union • Germany • Ireland • Japan • Netherlands • New Zealand • Poland • South Africa • Spain • UK • US 	<ul style="list-style-type: none"> • Austria • Belgium • France • Greece • Switzerland

Duration

1 month (or less)	<ul style="list-style-type: none"> • Canada • Germany (from date of first broadcast) • Netherlands (from date of first broadcast) • Poland (exemption for archives; must inform creator) • UK
3 months	<ul style="list-style-type: none"> • Ireland
6 months	<ul style="list-style-type: none"> • Japan • Netherlands (from the date of making the recording) • New Zealand • South Africa (from the date of making the recording) • US
1 year	<ul style="list-style-type: none"> • Australia
No limit (or N/A)	<ul style="list-style-type: none"> • Denmark • European Union • Spain

Limitations

Use only for specified purpose (broadcast)	<ul style="list-style-type: none"> • Australia • EU • Denmark • Germany • Ireland • Japan 	<ul style="list-style-type: none"> • Netherlands • New Zealand • South Africa • UK • US
Must be authorized to broadcast	<ul style="list-style-type: none"> • Australia • Canada • Denmark • Germany • Ireland • Japan 	<ul style="list-style-type: none"> • Netherlands • New Zealand • South Africa • Spain • UK • US
Must make copy using own facilities	<ul style="list-style-type: none"> • Canada • EU • Germany • Japan 	<ul style="list-style-type: none"> • Netherlands • South Africa • US
No synchronization	<ul style="list-style-type: none"> • Canada 	
No commercial use (sold, rented, leased, etc.)	<ul style="list-style-type: none"> • Canada • Ireland (incidental copies) 	
Does not apply where a collective exists to license the copy	<ul style="list-style-type: none"> • Canada 	