PRELIMINARY RESPONSE OF THE CREATORS' COPYRIGHT COALITION
TO *SUPPORTING CULTURE AND INNOVATION:*
Report on the Provisions and Operation of the Copyright Act

August 15, 2003

"Everyone has a right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author." - Article 27(2) of the UN Declaration of Human Rights

We are the professional associations and collective societies representing creators working in all disciplines, who are the authors and performers of artistic, literary, dramatic and musical works that reflect our country to Canadians and the world. We have come together as creators' representatives because we have common concerns, most also shared with DAMIC, our sister coalition in Quebec representing creators in that province.[1] Many of these concerns relate to new opportunities presented by the revolution in communications resulting from digitization and the Internet, which are being lost because Canadian copyright legislation has not kept pace.

Better dissemination and accessibility of their creations, particularly on the Internet, is a goal that creators share with users. However, creators' rights - economic rights and moral rights - are being eroded as educators, librarians, media businesses, Internet service providers and other users of copyright works, including individual consumers, help themselves to the work of creators without regard for the effect on creators. In these instances copyright is ignored. In other instances, creators lose because there are legislated exceptions in the *Copyright Act* or because producers pressure them to sign away their rights.

We believe that creators' lack of bargaining power and the structure of the industries in which they work usually means that comparatively few creators enjoy the economic success that should parallel artistic success. It is essential to explore solutions including amendments to the *Copyright Act* that will strengthen creators' rights and improve their economic well-being.

It is no secret how difficult it is for creators in this country to make a decent living. Those who freelance generally have to support their artistic work with jobs in other fields. Employed artists generally do considerably better but even they do not earn very much. For example, the average employment income of full-time and part-time or part-year musicians in the year 2000 was $16,090; for visual artists, actors and writers, it was $18,666, $21,597 and $31,911 respectively.[2] We know that the income of freelance writers has stagnated over the past two decades, remaining at its 1979 level. In 1998 the average net professional income of freelance book and periodical writers was $11,480.[3] Yet advocates for users of copyright press for legalization of "free" uses. Without copyright laws that deal effectively with the new communications developments, the ability of creators to earn a living will decline further. We as a coalition of organizations representing creators intend to be a voice in the advancement and defence of their copyright interests in the face of forceful demands by influential and powerful interests for more and more concessions.

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[1] Droit d'auteur/Multimedia/Internet/Copyright.
[2] Statistics Canada.
[3] *Quill and Quire* survey, September 1999.

The demands of users are identified, loud and clear, in the document entitled *Supporting Culture and Innovation*, the Government's report on the operation of the *Copyright Act* required by Section 92, which was enacted in 1997 as part of Bill C-32. We will subsequently refer to this report, issued by the Government in October 2002, five years after the 1997 copyright amendments, as the "Minister's Report". This was the first step in the long-awaited "Section 92 Review" of the *Copyright Act*. Section 92 requires that "the Minister shall cause to be laid before both Houses of Parliament a report on the provisions and operation of this Act, including any recommendations for amendments to this Act."

Some of the amendments enacted by Bill C-32 were controversial and, although the Section 92 Review is intended to cover the workings of the entire *Copyright Act*, our expectation was that the Minister's Report would be an assessment of how some of the new exceptions and other provisions were working and their effect on both rightsholders and users. In our view the Minister's Report, summarizing creator and user issues, falls short of being such a report and we are concerned that this will mean that Parliament will be called on to make far-reaching decisions that will have a great impact on the professional lives and personal welfare of creators without adequate information.

We are concerned too about the timing for dealing with two issues identified in the Minister's Report as separate issues. "Access and Education Issues" are listed as short-term issues, to be dealt with within 1 to 2 years, while "Collective Rights Management" is listed as a medium-term matter to be dealt with within 2 to 4 years. It is our opinion that these two issues are inextricably linked.

STRENGTHENING CREATORS' BARGAINING POWER

Although the *Copyright Act* provides authors and performers with rights, it does very little to address in any significant way the lack of bargaining power of creators, who are often forced through economic necessity to either to sign away their rights altogether or to license them for a pittance. The *Status of the Artist Act* allows bargaining between organizations representing creators and federal producers for minimum terms agreements, but most work performed by most creators falls under provincial jurisdiction. Only two provinces have similar legislation; the others show little or no sign of following suit. We are therefore looking to federal legislators and copyright legislation to provide better balance between creators and producers.

The imbalance in bargaining power is probably best demonstrated by the freelance journalists and photographers' dispute with newspaper and other database publishers and aggregators, referred to in the Minister's Report (page 17). Although the courts in Canada have not yet determined the issue of whether older, non-explicit licences cover digital as well as print rights, it seems likely that they will come to similar conclusions as courts in the United States, the Netherlands and elsewhere, which have found in favour of the freelancers. However, even if the writers are as successful in the Canadian lawsuits as we anticipate, most publishers have more recently been issuing revised contracts that scoop up all rights and, with very few exceptions, only those freelancers who are prepared to accept these terms get work. Sad to say, these are the largely the same freelancers who took a hit from Bill C-32 with respect to the single copy reprography exception and fair dealing defence, agented by librarians and combined with interlibrary loan by digital transmission. Writers argued unsuccessfully that such an exception would amount to expropriation without compensation and that there should be no exemption when a work is available under a licence from a collective society. Bill C-32 also failed photographers as it did not rectify all of the anomalies of ownership and term of copyright for photographers.

The hard-learned lesson experienced by the freelancers with respect to their electronic rights is a general one: to protect creators, the *Copyright Act* should prohibit the granting of rights or modes of utilization of rights not yet in existence or not reasonably foreseen by the creator and producer in their negotiations.

Visual artists also have little bargaining power. Bill C-60 (enacted in 1988) introduced an exhibition right, unique to Canadian copyright law and potentially extremely valuable to artists. We have concerns about how this right is being dealt or dispensed with, to the detriment of artists, who are frequently pressed to waive their exhibition right. The Minister's Report (page 14) identifies another long-term demand of visual artists which has not been implemented: amendment of the *Copyright Act* to include *droit de suite* would entitle an artist to a percentage of the purchase price of artistic work whenever it is resold. For certainty that artists will benefit, this right, as well as the exhibition right, should be both unwaivable and unassignable.

The *Copyright Act* provides a right of remuneration to performers for performances in public or communication to the public by telecommunication (other than retransmission)[4] and to authors and performers for the private use of a musical work in a sound recording and of a performer's performance contained in a sound recording.[5] The Act gives exemptions to retransmitters of broadcast signals and to educational institutions for taping off-air, at the same time providing for payment of royalties to copyright owners including authors and, in the case of off-air taping, including performers as well. Wherever creators have a right to remuneration, sometimes termed "equitable remuneration", the Act should make this right unwaivable (e.g. as in the Rental Rights Directive of the European Union) and unassignable, to ensure that it will always be the creators who actually benefit.

To deal with situations where an author or performer grants rights by way of contract that only provides for compensation for some uses of those rights, the *Copyright Act* should provide that he or she is entitled to payment for any other use of those rights. The Minister's Report (page 21), referring to this as an issue for audiovisual performers, points out: "If such contracts are silent on particular uses, however, performers have no right to receive compensation for those uses." We see it as a more a general issue affecting other creators as well.

We applaud the proposal of the Creators Rights Alliance in the United Kingdom that authors, presumptively, be given a right to participate proportionately in all revenue streams generated by a work, as in France, Greece, Spain and to some extent Italy. Germany has recently extended a legal right of adequate remuneration to authors.[6] Under the Canadian *Copyright Act*, in the absence of a negotiated standard of remuneration between industry associations, the Copyright Board could be the arbiter where authors and producers fail to agree on such remuneration.

WHAT DO WE WANT?

There are a number of significant issues affecting our memberships where our own observation and experience have led us to conclude that creators are adversely and unfairly affected. We believe that further study and assessment is needed, so that adequate information on the working of the *Copyright Act* will be available to the Parliamentary Committee charged with the next stage of the Section 92 Review. In some instances the research may be best commissioned or done by Government itself and in some instances, funding permitting, by ourselves.

LICENSING, NOT EXCEPTIONS

We believe that licensing, not exceptions, is key to providing better access to users of copyright material. As a result of intensive lobbying by broadcasters, educators, librarians and other users, who are often public sector institutions, a number of exceptions were enacted as part of Bill C-32, adding greater complexity to the *Copyright Act* and compromising the principles of copyright protection. These exceptions have cost creators, but these costs have not been measured. Although a creator may suffer a trivial loss when a single copy is made by a single individual, the cumulative effect of many individuals making copies of the same material is costly. Like other suppliers, creators want to be paid for what they provide. **We oppose new exceptions that will - in any way - conflict with the normal exploitation of a work or that unreasonably interfere with the reasonable interests of the creator.** New means of technology do not justify new exceptions.

We are alarmed by the suggestions in the Minister's Report that existing exceptions may be extended into the digital environment, where their impact will be even greater for reasons that are well known, including the ease with which copies can be sent to multiple users, with which perfect copies may be made, or with which copies can be distorted, with or without attribution to the creator. The Minister's Report suggests explicitly with respect to libraries and educational institutions (page 28) that "current exceptions may not address activities undertaken by these institutions in the digital environment….and the present exceptions in the Act should be examined to consider whether they need to be adapted to new technology and the digital environment." There is no reference to the possibility of addressing these activities by providing good access by collective or other licensing.

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[4] *Copyright* Act, Section 19.
[5] *Copyright Act,* Section 81.
[6] *Between a Rock and a Hard Place, The Problems Facing Freelance Creators in the UK Media Market-place,* A Briefing Document on Behalf of the Creators' Rights Alliance, written by Lionel Bently and published by the Institute of Employment Rights, London, 2002.

Where individual licensing is impracticable, because the transactions involved are numerous, low-value and uneconomic, collective licensing can provide the access looked for by users. It is our view that collective societies have proved themselves to be effective intermediaries between copyright owners and users. The Minister's Report (page 30) acknowledges this: "By and large, collective management has worked, but many stakeholders seek legislative reform to enhance access." It also indicates (page 31) that the Government is looking for "administrative solutions that facilitate a more efficient rights management scheme, and possible legislative solutions such as extended collective licensing…." Collective societies provide users with inexpensive, prompt and hassle-free access to their world repertoires comprising millions of Canadian and foreign works. **We oppose exceptions for special interests, as the result of exceptions is to increase the complexity and cost of collective licensing. It is our position that there should be no exceptions where works are available from a collective society.**

Educational exceptions including performances for educational purposes. Bill C-32 introduced a number of educational exceptions, including Section 29.4(2), which permits copying on the premises of an educational institution for a test or examination. Section 29(5) permits educational institutions to perform works, on a non-profit basis and for educational or training purposes, for an audience primarily of students and instructors. Sometimes these works are adapted by the institution without the author's knowledge and permission. This exception for performances has affected revenues to playwrights, composers and lyricists, though with no reporting obligations on educational institutions we do not know the extent of this. We do know that most of these authors struggle for a living.

Even though the impact of these amendments on rightsholders and educational institutions is unknown, further amendments are being demanded by educators. The Minister's Report (page 29) identifies as an issue whether Sections 29.4 to 29.9 of the *Copyright Act* should be amended to extend the exceptions for educational institutions to "certain freely available material on the Internet" without mention of alternative voluntary collective licensing solutions. The United States Copyright Act, as recently amended by the passage of the TEACH Act, gives educators the right to use portions of copyright works on-line to facilitate distance education, but only if "instructor-mediated" and subject to rigorous time and content restrictions. Many diverse requirements will mean some institutions in the United States will not be able to comply. Educators in Canada will find it much easier to obtain licences from collective societies for such material. Because educators say it is "commonplace" to obtain (unencrypted) copyright material from the Internet is not reason to create an exception that takes from creators the opportunity ever to receive licensing revenues for such activities. Creators are strong supporters of schools, but they both need and deserve to be paid for their work.

Library exceptions. Non-profit libraries, archives and museums ("librarians") demanded and obtained, with the passage of Bill C-32, a single copy periodical exemption, just as Access Copyright (then CANCOPY) was ramping up its licensing of public libraries. The anticipated income stream from this licensing to writers, with respect to their articles published more than one year previously, evaporated.[7] Bill C-32 also allows a librarian to do anything by way of "fair dealing"for any person that he or she could do personally[8] and even, with respect to most printed matter including entire articles, to send a copy electronically to the patron of another library, as long as the patron does not receive the copy in digital form.[9] Revenues from public libraries paid to creators through their collective societies are consequently a trickle of what they would otherwise be. We believe that this single copy exception - permitting libraries to provide document delivery services - breaches Canada's international treaty obligations, specifically the TRIPs Agreement and Article 9(a) of the Berne Convention and should be rolled back.[10]

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[7] *Copyright Act*, Section 30.2 (2).
[8] *Copyright Act*, Section 30.2(1).
[9] *Copyright Act*, Section 30.2(5).
[10] The TRIPs Agreement (Trade-related Aspects of Intellectual Property Rights) came into effect in Canada on January 1, 1996, as an annex to the agreement establishing the World Trade Organization. Article 9(1) of TRIPs not only requires members to comply with most of the substantive provisions of the Berne Convention including Article 9(2). Article 13 of the TRIPs Agreement also states: *"Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder."* For the specific text of Section 9(2) of the Berne Convention, see the last section of this paper. Article 10 of the WIPO Copyright Treaty also uses language similar to Article 9(2) of Berne. The WIPO Copyright Treaty, adopted by the WIPO Diplomatic Conference on

Judicial system. Another special interest is advocating an exception "to satisfy the interests of the justice system" (page 26). The effect of this would be a forced subsidy from copyright owners while law offices still charge their clients hefty amounts to cover photocopying costs. The Minister's Report suggests that the copying of legal materials may already be covered by fair dealing, as an inference from a case now before the Supreme Court of Canada, notwithstanding the Federal Court of Appeal's expressed views that there was insufficient evidence to make a ruling on this issue and that the availability of collective licensing would be a factor.[11] The affected rightsholders - mainly legal writers and their publishers - are participants in collective licensing. Regardless of what the courts may decide, legislators now have an opportunity to decide where such costs should equitably fall. If desirable that costs should be borne by society as a whole, this is not achieved by loading them on those who have created and produced the materials.

Perceptual disabilities. Section 32 is an exception for persons with perceptual disability or non-profit organizations acting on their behalf, enacted by the passage of Bill C-32 even though Access Copyright was already licensing the uses covered for a nominal fee. When this legislation was introduced, it contained a provision for collective administration with respect to reproduction for the perceptually disabled, but this was eliminated before the bill was passed.[12] The Minister's Report (page 29) raises only the issue of whether amendment is required to address new technologies, without any question as to the needs of the disabled or the impact on rightsholders. The restriction on the existing exception where a work is "commercially available" specifically excludes commercial availability through collective licensing. We think this is unfair. Creators have always been generous in permitting their works to be used by persons with perceptual disabilities, but creators (many of whom are economically disadvantaged) do object to a forced donation - to being the only involuntary "contributors" to the creation of materials for the perceptually disabled.

Fair dealing. Fair dealing has provided a flexible defence to copyright infringement for some substantial copying, subject to quantitative and qualitative limits established by court decisions. The Minister's Report (page 29) raises as an issue whether to expand the categories now covered in the *Copyright Act* beyond the current purposes of research or private study, criticism or review or news reporting. Notwithstanding that Canada's "fair dealing" is less broad that the American doctrine of "fair use" and that we ourselves are users as well as creators of copyright material and believe in a strong public domain, we oppose the expansion of fair dealing beyond its present categories. There is no back-up factual evidence to suggest inadequate availability of material either through licensing solutions or fair dealing.

Contractual limitations on exceptions and uses. The Minister's Report (page 27) raises the issue of whether contracts should be able to nullify or limit exceptions in the *Copyright Act*. Users are pressing for an amendment that would provide that statutory exceptions should not be restricted by terms of licence. We believe that licensing agreements should continue to be able to trump copyright exceptions. This does not prevent a licensee from quoting from material, so far as fair dealing permits, although he or she may not have the convenience of being able to make an instant, perfect electronic copy of material accessed electronically. It may not be possible, and in any case should not be legal, to make an electronic reproduction of an electronic copy because of either technological measures or contractual prohibitions, but we do not oppose copying that is defensible "fair dealing" as long as it does not involve hacking.

The example from the U.K. copyright legislation, cited in the Minister's Report (page 28) to support the users' proposition that exceptions should not be restricted, requires licensors to authorize use of a minimum amount of material, no less than what the statute otherwise allows. This provision does not authorize users to break technological protection measures to help themselves to that material. We also note that licences may ignore or modify exceptions as a trade off for better access and that material can frequently be obtained from more than one source.

Certain Copyright and Neighbouring Rights Questions, Geneva, December 1996 and signed but not yet ratified by Canada, entered into force in March 2002.

[11] The Law Society of Upper Canada v. CCH Canada et al. WIPO Copyright Treaty and WIPO

[12] Australia provides a model for materials for intellectually handicapped persons being made available through a collective society. In the United Kingdom, specially designated bodies may make, for the handicapped, sub-titled and other modified copies of television broadcasts and cablecasts programs only if there is no collective licensing scheme.

The demands of users to create additional exceptions and defences will add to the complexity of the *Copyright Act* and make it even more difficult to understand and confusing to apply. In effect, these demands change the law from a statement of principles and rules to something that looks more like a contractual agreement, complete with provisos and conditions.

ELIMINATING OR REDUCING LIABILITY FOR COLLECTIVE SOCIETIES AND LICENSEES

A key issue from the perspective of many rightsholders is the need to minimize the liability of their collective societies and licensed users if and when copyright infringement occurs because a work appears to be, but may not be in the repertoire of a collective society. This is particularly important to those collective societies that are still developing their repertoires or moving into new areas of licensing, for example, reprographic and visual arts collectives. Back-up mechanisms reducing the exposure of both collective societies and users to claims of copyright infringement will support and facilitate more efficient and cost-effective collective licensing.

Compulsory licences. The Minister's Report (page 29) also points to the possibility of accessing material for educational purposes through compulsory licence provisions, which we in general have not advocated, although the *Copyright Act* does now have several compulsory regimes, with respect to retransmission of telecommunications signals,[13] off-air taping for educational institutions[14] and copying for private use (music onto blank audio recording media)[15]. These schemes, which we do support, provide payment for members of the collective societies that file tariffs, which are subject to Copyright Board approval. With respect to retransmission and off-air taping there may also be compensation for non-members.[16] However there is no discussion in the Minister's Report of how these compulsory licences are working or whether there are other, better ways of achieving the same goal of good access with little or no risk of infringement.

Other existing mechanisms to reduce liability. Mechanisms to reduce or eliminate the liability for copyright infringement are found in a number of provisions in the *Copyright Act*. Section 38.1(4), which limits awards of statutory damages against certain collective societies, not including collectives such as Access Copyright, the CARFAC Copyright Collective or the Playwrights Guild of Canada, to a sum of not less than three and not more than ten times the amount of the applicable royalties. While there has been no litigation against these unprotected collective societies, the absence of any limitation on their liability may be a potential hazard as they move to increase their licensing of material for use in digital form and in commercial sectors. Section 38.1(6) exempts educational institutions, libraries, archives and museums from the application of statutory damages where a collective licence is in place, in tandem with Section 38.2, which limits damages awarded against a licensed educational institution, library, museum or archive to the amount of royalties that would have been paid by the collective society whose repertoire could have included, but did not include, the infringed work Neither section extends any protection to the collective society, which needs limited liability as much as its licensee - or more, in instances where it has agreed to indemnify the licensee.

New legislation to reduce liability. Compulsory licences aside, the existing mechanisms in the *Copyright Act* are insufficient to limit the liability of some collective societies and their licensees for copyright infringement occurring where a licence appears to cover a work which is in fact not in its domestic or foreign repertoire. We believe that further mechanisms are needed to reduce the risks and to encourage the further growth of collective licensing of works, particularly works in digital form. We point out, however, that all such mechanisms are not suitable for all types of collective licensing and need to be considered sector by sector with regard to each particular right.

Mechanisms to reduce liability could build on those already existing in the *Copyright Act*, such as the limits on damages awards to what the collective society would have charged for a licence or further restrictions on statutory damages. Canadian legislators could also draw on the experience of other countries, including the United Kingdom, where legislation provides that if a licence from a collective society does not specify all the works it covers, the collective society must indemnify its licensees for any copyright infringement caused thereby. In the Scandinavian countries, collective societies have the benefit of an extended collective licence, which authorizes the society to license all works of a particular genre once it has signed up a significant number of creators working in

[13] *Copyright Act*, Section 31.
[14] *Copyright Act*, Sections 29.6 and 29.7.
[15] *Copyright Act*, Section 80.
[16] *Copyright Act*, Section 76.

that genre. We understand that the Government has already commissioned further research on the operation of the extended collective licence and look forward to the release of this study.

We advocate that the *Copyright Act* be amended to remove criminal liability from an infringing collective society or a licensee functioning responsibly within a collective licensing scheme.

ENFORCEMENT AND PROTECTION

Effective remedies for copyright infringement are essential. The Minister's Report (page 22) suggests that it may be desirable to eliminate the possibility of a criminal prosecution where the retail value of the infringing copies is below a certain threshold. As the criminal justice system only comes into play at the Crown's discretion, we see no reason to preclude any possibility of criminal remedies that could assist copyright owners other than big businesses.

A similar issue is raised by the Minister's Report (page 23) with respect to statutory damages: should the plaintiff be required to establish a minimum threshold of actual damages suffered? It should not be forgotten that statutory damages serve as a deterrent. By taking into account the fact that proof of the extent of copying may be elusive, litigation costs for plaintiff rightsholders are less. We are against changes to statutory damages that will make them less available to individual creators who have little means to engage in expensive litigation.

Prior to Canada's ratification of the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, Canadian legislation must be amended to provide legal protection of technological measures, such as encryption, to protect copyright material as well as adequate legal protection for rights management information embedded in copyright material both to assist licensing and monitor its use.[17]

Creators need affordable, effective transborder enforcement of copyright in Canada with respect to goods incorporating works (e.g. books and recordings). We are concerned that the right of Canadian copyright owners to take action in Canada to enforce their rights with respect to the transborder communication of their works into Canada has been eroded by digital transmission and the Internet.

INTERNET SERVICE PROVIDER LIABILITY

While the issue of the liability of Internet service providers (ISPs) is currently before the courts, technological change may necessitate amendments to the *Copyright Act*. Rightsholders need a remedy against ISPs because they are, for all intents and purposes, the only "reachable target" in Canada. ISPs are the gatekeepers to the Internet, and holding an ISP responsible for infringement may be the only recourse reasonably available to a rightsholder.

The Minister's Report (page 22) does not mention the possibility, raised by rightsholders for consideration, of linking an exemption from liability for Internet service providers to collective licensing. Collective societies may be in an excellent position to grant the rights that ISPs may require to protect them from liability for copyright infringement. Without a licence from a collective society or copyright owner for copyright material transmitted to their subscribers, an ISP must be obligated to take down such material or block access by their subscribers.

PRINTER AND COPYSHOP LIABILITY

Like ISPs, a printer or copyshop may be the only reachable target of a copyright infringement complaint. However the Minister's Report (page 23) is only concerned by their possible lack of knowledge of the infringing character or their activities and "their practical inability to control the content of the material processed through their services". Where is the need for such a provision for copyshops when Access Copyright has been licensing them for over a decade? Restrictions on liability for copyshops or other reproduction services, if any, should be linked to collective licences and to requirements to co-operate with rightsholders in pursuing infringers. Limited or excluded liability is also inappropriate for printers, who traditionally have taken responsibility for what they agree to print, and rightly so.

[17] The WIPO Performances and Phonograms Treaty came into effect in May 2002, after being adopted in December 1996 by the WIPO Diplomatic Conference on Certain Copyright and Neighbouring Rights Questions in Geneva at the same time as the WIPO Copyright Treaty. Like the WIPO Copyright Treaty, it has been signed but not ratified by Canada.

MAKING AVAILABLE RIGHT

With respect to this requirement of the WIPO Treaties which give rightsholders the exclusive right to control on-demand communications over the Internet and other digital networks, the Minister's Report (page 16) says the *Copyright Act* may already afford this protection to authors and makes no mention that they have vociferously demanded that this right be made explicit in the *Copyright Act* to make more apparent their authority to control electronic access to works by members of the public, at places and times individually chosen. **We support an explicit "making available right" for authors as well as for performers and makers of sound recordings.**

MORAL RIGHTS

We consider it an egregious error that the TRIPs Agreement, to which Canada adheres, specifically excludes author's moral rights.[18] Its deliberate exclusion is a prime illustration of the fact that creators' moral rights are perceived as impeding the agenda of big business and international trade. We will work with our colleagues in the international creator community to rectify this omission, as well as to press for strengthened moral rights in Canada's own *Copyright Act*.

The Minister's Report (page 17) raises authors' concerns that stronger protection of their moral rights is warranted in a digital environment. We think that this concern is well founded. The Minister's Report goes on to say that "Authors believe that some parties will require them to waive their moral rights as a pre-condition of the use of their works." This is an example of where we might have expected the Minister's Report to provide some empirical evidence concerning industry practice to determine if authors are routinely required to waive their moral rights with respect to certain types of productions. It is our observation that it is indeed routine, except in book publishing. We deplore this practice and note that in many countries moral rights are inalienable (for example, France and Germany) and elsewhere they are unwaivable except in writing (for example, the United Kingdom). **Any waiver of moral rights should be invalid unless it is explicit, detailed and in writing.** Creators have lobbied unsuccessfully for this since the 1980's when the *Copyright Act* underwent its first really substantial revision since its enactment in 1924.[19]

The Minister's Report (page 30) points out, as a problem, that the fair dealing defence fails if the user fails to acknowledge sources. There is no counterbalancing mention of the moral rights of creators or their concern that their material is much more likely to be misused subsequently or used with incorrect attribution. We are vigorous in our opposition to any amendment to the provision for fair dealing that removes the requirement to acknowledge the creator.

The *Copyright Act* requires amendment to provide moral rights for audio and audiovisual performers. **Failure to provide moral rights for audio performers is an impediment to Canada's ratification of the WIPO Performances and Phonograms.**

PHOTOGRAPHS

Bill C-32 failed to rectify the anomalies which leaves freelance photographers subject to special rules involving deemed authorship, first ownership of copyright and a shorter term of copyright for photographs in some circumstances. These special rules are unnecessary and discriminatory. The *Copyright Act* requires amendments to put photographers on the same basis as other creators. The rules for photographs not only disadvantage photographers, making it difficult for them to compete in an international, digital business environment. **Canada's failure to protect copyright for 50 years following the beginning of the calendar year following the author's death, in all photographs as in other works, impedes Canada's ratification of the WIPO Copyright Treaty and disadvantages all rightsholders.**

TERM OF COPYRIGHT

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[18] The TRIPs Agreement requires compliance with the substantive provisions of the Berne Convention (1971) other than its moral rights or "rights derived therefrom".

[19] Bill C-60, enacted in 1988, authorized collective administration of copyright beyond the performing rights in musical works and defined literary works to include computer programs.

We support extension of the term of copyright to 70 years following the beginning of the calendar year immediately following the author's death, as a matter of fairness for the creators of works and for consistency with protection in other countries including the European Union and the United States. The Minister's Report (page 18) suggests that it may be "a matter of public interest" to keep Canada's current protection to 50 years following death. It makes no mention that Canadian rightsholders cannot always benefit from the longer term of protection elsewhere because some countries refuse to protect the works of foreign authors for longer than the period of protection accorded them in their own country.

The Minister's Report (page 21) points out that the WIPO Performances and Phonograms Treaty requires an increased term of protection for sound recordings. The extension of the term of copyright protection for performers in their performances should match the extension for sound recordings required for Canada to implement and ratify this WIPO Treaty.

PRINCIPLES TO GOVERN UPDATE OF COPYRIGHT ACT

One reason for the complexity of the *Copyright Act* is that demands by users have resulted in departures from the simple principles of copyright. We agree in general with the comment in the Minister's Report that "The *Copyright Act* has…become a complex array of rights, exceptions, rules and procedures…." with the result that it is "overly complex, unclear and at times difficult to apply." The goal is "how ultimately to make the Act simple, coherent, balanced, internally consistent and easily comprehensible."[20] With these statements in mind, we believe that the future revisions to the process should be guided by the following principles:

1. Recognition of the creator as author and, absent any agreement to the contrary, as first owner of copyright (e.g. no special rules for commissioned works, notably photographs).

2. Strong moral rights ensuring authors and performers appropriate attribution and control over the integrity of their creations in digital and non-digital environments, even where there may be exceptions from economic rights.

3. Easy access for users (timely and equitably priced) to published works.

4. Fair payment for authors and performers.

5. Supportive environment for collective licensing where individual licensing is inappropriate because it is impracticable, unfair or not desired by the rightsholder.

6. No exceptions without demonstrated market failure or where works or other subject matter are "commercially available", as defined in the *Copyright Act*. [21]

7. Consistent term of protection for all works to the now established standard of 70 years following the author's death.[22]

8. Effective remedies for infringement of creators' economic and moral rights in a digital and non-digital environment.

9. Maintenance of Canada's territorial autonomy and jurisdiction, notwithstanding global distribution networks.

In addition to these guiding principles with respect to content, drafting should be governed by the following

[20] Minister's Report, page 11.
[21] Section 2 defines "commercially available" to mean, "in relation to a work or other subject matter (a) available on the Canadian market within a reasonable time and for a reasonable price and may be located with reasonable effort, or (b) for which a licence to reproduce, perform in public or communicate in public by telecommunication is available from a collective society within a reasonable time and for a reasonable price and may be located with reasonable effort;"
[22] WIPO Copyright Treaty does not permit the shorter term for photographs allowed by the Berne Convention.

principles for better comprehension.

! Use of similar and consistent language to describe similar rights (e.g. a "making available right" for authors and performers[23]), to ensure that existing rightsholders are not prejudiced by the introduction of new rights for other classes of rightsholders.

! Use of "technologically neutral" language to describe creators' rights so that new technologies of reproduction or communication will not necessarily require amendment of the law, while recognizing that amendments may occasionally be required to avoid serious damage to the fundamental interests of rightsholders (e.g. compulsory licensing for Internet retransmission of broadcast signals).

! Acceptability of made-in-Canada solutions consistent with international treaty obligations.

WHERE DO WE GO FROM HERE?

Some of the issues touched on above require research on the impact of the particular provision of the Copyright Act on both rightsholders and users. We propose that research should take place at least in the areas listed below. Without such research, the Parliamentary Committee cannot fairly and effectively carry out a "comprehensive review of the provisions and operation" of the *Copyright Act* mandated by Section 92.

A sector-by-sector study of the contractual relationships between creators and their producers or distributors, including practices with respect to moral rights waivers, the exhibition right in publicly-funded government and non-government institutions, and levels of compensation.

A survey or study of licensing by collective societies in Canada, with a view to identifying both efficiencies and desirable improvements, including an assessment of the effectiveness of existing mechanisms that affect collective licensing (e.g. the range of statutory damages and restrictions on statutory damages) and options to facilitate collective licensing (e.g. the Scandinavian extended collective licensing model and the United Kingdom's limited damages model).

A survey or study of the uses that have been made of the exceptions introduced in Bill C-32 (e.g. assessing the impact of the single copy exception in Section 30.2 on periodical writers and on libraries and the exception for school performances in Section 29(5) on playwrights, composers and lyricists and on schools).

A survey of how the exception for persons with perceptual disabilities is administered including its costs.

A study of the impact of any proposed revisions affecting authors and performers.

Questions asked of informants participating in such studies must include ones designed to measure the economic impact on all involved, but particularly on the creator whose livelihood depends on being able to market what he or she has created. We believe that the member organizations of the Creators' Copyright Coalition can be helpful with some of the answers. Factual information on these issues should have formed part of the package going to the Parliamentary Committee engaging in the Section 92 Review and should be available to users, producers and creators alike as they endeavour to work out accommodations on the various issues rather than simply re-engage in ancient arguments without all the facts.

We intend to make further submissions in the course of the Section 92 Review and the on-going copyright revision process, both as a coalition and as individual organizations, once we have had an opportunity to study and consider further the issues affecting the creators we represent.

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[23] Requirement of WIPO Treaties, clearly necessitating an amendment of the Canadian *Copyright Act* for makers of sound recordings and audio performers but causing debate on the necessity or desirability of being made explicit for authors.

WHERE WE STAND

Article 9(2) of the Berne Convention, which is echoed in Article 13 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) and most recently in Article 10 of the WIPO Copyright Treaty, states:

> *It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the right holder.*

There is a similar provision in Article 16(2) of the WIPO Performances and Phonograms Treaty to protect the interests of performers and producers of phonograms, though not in the Rome Convention, which has been key to protecting performers internationally. However the Rome Convention, to which Canada adheres, does provide that a state "may…provide for the same kinds of limitations with regard to the protection of performers… as it provides…in connection with the protection of copyright in literary and artistic works." This may, arguably, amount to the same thing as the specific language used in the Berne Convention, but without language comparable to Berne, ratification of this WIPO Treaty takes on a particular importance for performers of sound recordings. We want Canada to ratify both WIPO Treaties without delay.

Creators cannot survive if they are unable to license effectively, either themselves or through their collective societies. The communications revolution wrought by digitization and the Internet offer new opportunities for creators, but without legislation that deals effectively with the new technology, these opportunities will not be realized. Instead, the ability of creators to earn a living will actually diminish. Collective societies representing creators are seriously engaged in developing new ways of licensing to meet the demands currently being made by users. So far they have experienced considerable success, although creators still receive insufficient financial reward for their talents and labours. We believe that exceptions amount to expropriation without compensation. As well as being unfair, they are both unnecessary and undesirable, as they will exacerbate a growing imbalance in the law, decrease the bargaining power of creators, and impede cost-effective, efficient licensing, to the long-term disadvantage of everyone.

RESPECTFULLY SUBMITTED BY THE CREATORS' COPYRIGHT COALITION