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Olav STOKKMO

The Honourable James MOORE
Minister of Canadian Heritage
and Official Languages
15 Eddy Street
Gatineau, Quebec K1A 0M5
Canada

Brussels, 10/10/2011

Dear Minister,

Re: Bill C-11 and Canada's International Obligations

IFRRO, the International Federation of Reproduction Rights Organisations, has been made aware of your recently tabled Bill C-11, *The Copyright Modernization Act*, by our Canadian members Access Copyright and COPIBEC, which we are proud to count amongst our 131 members.

The previous Copyright Modernization Bill, Bill C-32, met with broad-based criticism from the creative and publishing communities. However, we note that the new Bill, Bill C-11, introduced on 29 September 2011, is identical to Bill C-32. We wish to express our concerns about some of the provisions raised in the Bill, especially as some of them do not seem to comply with international obligations of Canada, and more particularly with the three-step test, outlined in the Berne Convention and the TRIPS Agreement.

We believe that the proposed **educational and other non-commercial exceptions** will seriously affect the existing and future sales market for educational material and prejudice authors' and publishers' legitimate interests. Currently, publishers all around the world make significant investments in developing textbooks, technical and scientific material, both in analog and digital formats. Bill C-11 will undermine their efforts to offer important material to the educational community. Every country wishes its students and other citizens to have access to relevant local material, which reflects the reality of the country. This can only be achieved through a vibrant national text-book publishing sector. Text-book publishing is also the motor of the publishing industry and represents a substantial portion of the book and journal market. This is also the case in Canada. Moreover, the proposed exceptions are assumed to have an impact world-wide since they will allow copies of copyright-protected works to circulate widely through interlibrary loans, e-learning or commercial distributors like You Tube (as contemplated by the user-generated content exception).

We therefore encourage the Canadian government to support the building of access to copyright works in education via the well-established system of individual and collective management of rights. This will also put Canada in steps with the rest of the world. Collective management and licensing can offer better access to intellectual property, in a larger variety of ways and with wider usage opportunities, based on tailor-made solutions, than any exceptions to exclusive rights that are compatible with international standards and norms would allow. It also has the ability to create the appropriate balance between fair reward of rightholders' creation and investment and access for users, including the educational community.

The proposal for **Fair Dealing for the Purposes of Education [s. 29]** is too broad in scope to define a special case, particularly in light of Canada's Supreme Court decision in *CCH Canadian Ltd. v. Law Society of Upper Canada*, which has ruled that the fair dealing purposes must be given a "large and liberal" interpretation. The proposed expanded exception seems to "conflict with a normal exploitation of the work" and would therefore fail to meet Canada's international obligations under the three-step test referred to above.

The proposed **Display Exception [s. 29.4(1)]** and the **Tests and Examination Exception [s. 29.4(2)]** directly conflict with the normal exploitation of a work by removing the relevance of the availability of a licence and the right for any rightholder to make his/her work commercially available through other means than direct sales. These rights are currently managed through collective licensing in Canada similarly to the way it is done in other parts of the world.

The proposed **Interlibrary Loan Exception [s. 30.2(5)]** also conflicts with the normal, well-established market for the exploitation of a work as it has the potential to significantly reduce the size of the library market in Canada. This prejudice was foreseen in the Copyright Directive 2001/29/EC (European Directive on the harmonisation of certain aspects of copyright and related rights in the information society) that specifically excluded the online delivery of protected works, considering that such an exception would unreasonably prejudice the legitimate interests of authors and publishers.

The proposed exception for **Reproduction for Private Purposes [s. 29.22]** goes far beyond format shifting. Copying for private purposes is currently licensed around the world and is collectively licensed in the case of musical works in Canada. Again, when adopting Directive 2001/29/EC, the EU – considering the impact of such an exception and its international obligations – obliged Member States that would want to introduce such exception to also give a right to remuneration to authors and publishers.

With the proposed **Non-Commercial User Generated Content provision [s. 29.21]**, Bill C-11 permits the use of any published work in order to create a new work for non-commercial purposes as long as the use does not have a "substantial adverse effect, financial or otherwise" on the exploitation of the original work. "Substantial adverse effect" is not the proper test: the test is normal exploitation. By exempting these uses, Bill C-11 deprives rightholders of potential and actual economic gains, which would conflict with the normal exploitation of the work. This exception could cover, for instance, course

packs. The possibility to make course packs by teachers and professors is one of the different types of licences that are offered by RROs around the world.

This Bill introduces several additional new exceptions without any compensation for authors and publishers. If passed, the Bill will deprive rightholders of important revenues, jeopardizing CAD 40 million annually to rightholders, according to our Canadian member organisations. It would impact authors and publishers – not only in Canada, but worldwide – because Canadian RROs, through reciprocal agreements, represent works published in numerous foreign countries. For these reasons, we are concerned that Canada is offside of its commitments to its trading partners.

IFRRO is an international, non-governmental organisation representing national Reproduction Rights Organisations (RROs) world-wide. RROs act on behalf of authors and publishers of text- and image-based works whenever the individual exercise of their rights is impracticable. These organisations began their activities originally in response to the need to license wide-scale photocopy access to the world's scientific and cultural printed works. Today, RROs in membership of IFRRO collect and distribute remuneration for reprographic reproduction and certain digital uses.

Members of IFRRO also include national and international creators' and publishers' associations such as the European Writers Council (EWC), International Publishers Association (IPA), International Association of Scientific, Medical and Technical Publishers (STM), European Visual Artists (EVA), European Newspapers Association (ENPA) and International Federation of Journalists (IFJ) on the international level.

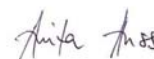
We believe that strong copyright protection is necessary to encourage authors and publishers to invest in further creation. This is at the root of the knowledge society so loudly touted. We welcome the government's commitment to updating Canada's copyright laws and urge that changes be made to Bill C-11 in Committee that will ensure that Canada's copyright regime is not detrimental to authors and publishers and in line with its international obligations.

We ask that the points raised in this submission be considered in the further work on Bill C- 11. If required, we will be pleased to expand further on them in a personal meeting.

Yours sincerely,



Olav Stokkmo
Chief Executive



Anita Huss
General Counsel