12 February 2008

The Honourable Jim Prentice, P.C., M.P.
Minister of Industry
House of Commons
Ottawa, Ontario
K1A 0A6

The Honourable Josée Verner, P.C., M.P.
Minister of Canadian Heritage, Status of Women and Official Languages
House of Commons
Ottawa, Ontario
K1A 0A6

Dear Ministers:

The Business Coalition for Balanced Copyright is a coalition of telecommunications, broadcasting, retail, Internet, technology, research and security organizations interested in the ongoing development and modernization of Canada's *Copyright Act*. A list of current participants is provided at the end of this letter.

While Members of the Coalition will continue advancing their respective positions on those issues that directly impact their industry, they strongly support a balanced approach to copyright reform and believe that the public interest and the rights of consumers and users of copyrighted works need to be considered and protected as the *Act* is being amended to accommodate technological changes.

We believe that copyright reforms should not prevent the legitimate access by consumers to copyright works, prevent innovative research, or impede the adoption of new technologies for fair commercial uses or to extend and promote educational opportunities. Any amendment to the *Act* that is aimed at addressing issues related to the Internet and the development and use of new technologies in Canada must not prejudice Canada's domestic and international economic interests.

Given that it has now been over a decade since the WIPO treaties were finalized, Canada actually finds itself in a somewhat unique position among developed nations. Canada is able to learn from the steps taken by other nations to meet their own 1996 WIPO treaty obligations, and to do so in a much more mature online environment. Similar to other nations, Canada should take advantage of the considerable flexibility the WIPO treaties provide to meet our obligations.

The Coalition therefore advocates an approach to the next round of copyright amendments that balances the reasonable needs of the various stakeholders while at the same time allowing Canada to adhere to the WIPO treaties. These amendments should reflect the view expressed recently by the Supreme Court of Canada when it held that *"it would be as inefficient to over compensate artists and authors … as it would be self-defeating to under compensate them."* An approach to copyright amendments that truly

balances the reasonable needs of the various stakeholders is the only way to ensure a vibrant and innovative community for creators and users alike.

Specifically, this balanced package approach should include: i) the balancing of new protections and user rights, ii) the codification of roles, and iii) an increased focus on rational and effective enforcement. The enclosed attachment clearly outlines how these key elements work together to ensure a true balance today for a strong Canadian copyright regime for all stakeholders: creators, consumers and industry.

Members of the Business Coalition for Balanced Copyright include:

Canadian Association of Broadcasters (CAB)
Canadian Association of Internet Providers, a division of CATAlliance (CAIP)
Canadian Cable Systems Alliance (CCSA)
Canadian Wireless and Telecommunications Association (CWTA)
Computer and Communications Industry Association (CCIA)
Retail Council of Canada (RCC)
Google
Third Brigade
Tucows
Yahoo! Canada
Cogeco Cable
EastLink
MTS Allstream
Rogers Communications Inc.
SaskTel
TELUS

A balanced "package" approach for a strong Canadian copyright regime

1. Balancing new protections and user rights

- **Expanded "fair dealing" for users:** If Canada is to truly modernize its copyright legislation, then the time has come for Canada to broaden the existing fair dealing rights in the *Act* by adopting a more flexible approach that is illustrative rather than exhaustive. Such an approach is consistent with the statement of principle of the Supreme Court of Canada when it speaks about "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.

- **Technological Protection Measures (TPMs):** Rules against the circumvention of effective technological measures that are used by rights owners in connection with the exercise of their rights must not prohibit Canadians from engaging in non-infringing activities. Rules prohibiting circumvention of TPMs for copyright infringing purposes should, if at all, only target persons who manufacture or traffic in services or devices whose primary purpose is to permit circumvention on a commercial scale or to the material prejudice of rights holders. Sufficient limitations and exceptions to such anti-circumvention rules must be ensured so as not to impede fair dealing, ongoing innovation and research in Canada. We otherwise risk harming emerging Canadian industries and exposing Canadian businesses and consumers to unnecessary and costly litigation.

- **Making available and distribution rights:** To the extent necessary to meet its WIPO obligations, Canada should introduce only a very narrow exclusive right of making available for those rights owners who need it to protect the legitimate online distribution of their works. New technologies have made it possible to legally purchase music, films, games, software and other copyright products online without the need of a physical medium. Unnecessarily expanding communication rights in Canada would: i) stifle or impede innovation of new delivery technologies in Canada, ii) add an additional layer of rights payments where compensation already exists, for example, by unfairly doubling the delivery cost of online music including in films, games, software and other copyright products, and iii) create an imbalance with monies flowing to foreign jurisdictions such as the US and no reciprocal payments flowing back into Canada. The WIPO treaties allow for a great deal of flexibility and do not require Canada to treat downloads as communications to the public, so it is possible to amend our law so that the same rights owners are not paid twice for the downloading of the same copyright products.

- **Private copying:** The original intent of the private copy levy was to compensate rights holders of recorded music for private copies being made by consumers for their own personal use onto media that was not really capable of being protected through analog technology. The purpose of a private copy levy is now growing less apparent as legitimate music services exist in Canada and effective technological protection measures are being deployed as necessary by content owners. The government should seriously question the continued existence of

the private copy regime. At a minimum, it should abandon any consideration to expand the scope of this now outdated and unfair attempt to find a balance between users and owners' rights. Two simple options are available to the government in this regard:

i) amend the definition of "*audio recording medium*" in section 79 of the *Act* so that it reads "*… of a kind used by individual consumers whose primary purpose is to record music*" rather than the existing broad and unhelpful language "*… of a kind ordinarily used*"; or
ii) pass a regulation pursuant to section 87 of the *Act* that clearly excludes any new recording medium thereby preventing the unintended expansion of the private copy regime beyond its original intent.

- **Avoid copyright liability for technical processes:** The *Act* is outdated in its failure to acknowledge the incidental nature of technical processes, particularly in relation to the reproduction right. For example, for Canadian broadcasters, the reproduction is an intermediary step in the course of a legitimate industrial activity – broadcasting music – for which creators are already adequately compensated. The *Act* should be amended to grant broadcasters a full and meaningful exception from the reproduction right, similar to that which exists in most other developed countries. A similar exception should extend to reproductions that are part of the technical processes of operating search engines or other Internet services.

2. Recognizing roles

- **No liability for Internet service providers (ISPs):** As all Canada's major trading partners have long recognized, Internet service providers should face no copyright liability when acting as intermediaries. This position is consistent with a decision of the Supreme Court of Canada that ISPs are not responsible for the actions of their users. We should codify the existing voluntary "notice & notice" regime whereby ISPs pass on to their users notices of alleged copyright infringement that should contain standardized language and be subject to reasonable cost recovery similar to commercial arrangements being negotiated between ISPs and content owners in other jurisdictions. We should learn from the US experience and recognize that US-style "notice & takedown" is simply not effective for peer-to-peer activity nor is termination of a household's Internet connection for this activity.

3. Rational and effective enforcement

- **Penalties to fit the behaviour:** Canada is in need of a more rational and effective copyright enforcement regime. While those who infringe copyright on a commercial scale or to the material prejudice of rights holders should be subject to appropriate penalties, courts should have more flexibility to limit damages in circumstances where there is only minimal harm to rights holders resulting from the conduct. Civil and criminal remedies should proportionately reflect actual harm and not serve a punitive purpose except in exceptional or egregious circumstances.