Submission

On The

COPYRIGHT MODERNIZATION ACT

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Submitted by

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*Representing book publishing in Canada since **1910***

A healthy creative community supports a vibrant knowledge economy. A copyright regime that undermines our creators' ability to be remunerated for their creations will poison the well.

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Executive Summary

As Canada's primary English-language book publishing industry associations, the Canadian Publishers' Council (CPC) and the Canadian Educational Resources Council (CERC) have long represented the interests of companies which publish books and digital and other electronic media for elementary and secondary schools' students and teachers, colleges and universities' students and faculty, the professional (law, medicine, accounting) and reference markets, as well as the retail and library sectors.

As employers of nearly 4500 Canadians, our members have much at stake in the Copyright Modernization Act (Bill C-11). Last year alone, Canadian authors received more than $50 million in royalties from works in which CPC and CERC members have invested. More than three-quarters of all new and original English-language Canadian works published in Canada annually across all educational disciplines and across all genres are published (print and electronic) by our member firms. Furthermore, our member publishers deliver $70 million of business each year to Canadian-based book print production and many millions more to rapidly growing digital development.

We have a vested interest in ensuring that modernization of the Copyright Act to accommodate new technologies does not result in a serious undermining of our industry***. A lack of confidence in the integrity of the market combined with a lack of necessary remedies would reduce publisher investment, innovation and development of original print and digital Canadian content.*** This would be the opposite of the desired outcomes articulated at Canada 3.0 2010 (May 10-11, Stratford), Canada's premier digital media forum or those in the government's consultation process that followed, Improving Canada's Digital Advantage.

Copyright reform is necessary to implement the WIPO treaties by introducing protection for technological protection measures (TPM) and digital rights management (DRM). The protection of TPMs is essential as many business models for creative works depend on TPMs. However, it should not be necessary to resort to TPMs (somewhat antithetical to publishers' raison d'être which is to make available) in order to have reliable copyright protection. Copyright reform also needs to support the rights of copyright owners, publishers, distributers, etc. with clear definitions and effective remedies.

With care in the definition of any exceptions and the delivery of effective means to control infringement, TPMs do not have to be an indispensable part of a business model.[1]

Enshrining consumer uses in exceptions with ill-defined scope, minimal and vague accountability and, even more concerning, limited consequences for non-compliance will be devastating to the knowledge industries. This approach undermines existing distribution models (such as collective licensing). There is little recognition of the self-interest of new players (Internet Service Providers (ISPs), libraries and educational institutions) so their role in infringing activities, whether active or passive non-enforcement) is not adequately addressed. The rights holder appears to be expected to manage rights directly with the user, at an untenable enforcement cost, or to lock everything up.

[1] [CPC and CERC intend to propose draft amendments but will submit those in a separate document]

An apparently intended, and distressing, consequence of a multi-pronged expansion of educational exceptions — expanding fair dealing by adding "education" as a purpose, and expanding exceptions for educational use and library use — is the repudiation of collective licensing. Collective licensing has developed worldwide to address the volume and complexity of permissions for re-use and to mitigate the negative impact on creator compensation of copying of works using ever-higher-quality copying technologies. Collective licensing plays a key role in the context of education.

Expanding educational exceptions is not about a market failure on the part of publishers to provide access. Rather, it is about saving money for the educational community, out of the pockets of the publishers, domestic and global. This will put Canada seriously out of step with its international partners.

In a similar vein, the expansion of library exceptions to encompass digital reproduction and circulation is being proposed. Ironically, there was supposed to be a formal review and assessment of the inter-library loan impact 3 years after the Copyright Act was amended in 1997. It did not occur. We still believe that the formal review and assessment is required.

The government has stated as an objective that copyright reform should be technology-neutral. There is a regrettable lack of sensitivity to the self-interest of the disparate interest groups connected to the new technologies that test fundamental copyright principles.

1. The **intermediary community**, no longer neutral 'middlemen'
2. The **end-user** with peer-to-peer distribution systems to share copyright works — no compensation to rights holders
3. **ISPs and telecoms** surging into active content distribution — no licensing, no compensation to rights holders
4. **Search engine services** expanding their information location tools, digitizing content and providing parts of that content which may exceed a “fair” amount both qualitatively and quantitatively — and no compensation to rights holders

There is also a clear trend to support the creation of numerous exceptions for personal uses of copyright material, "for free". This is a completely unrealistic reflection of the purpose of copyright in the marketplace and a serious impediment to the normal evolution of business models.

In summary, we need to remind ourselves at every juncture of the original purpose of copyright — to incent the development of and ensure the access to creative works.

New concepts, exceptions and uses must be clearly defined. Leaving clarification to the courts is not a solution – costly, time-consuming and decisions, limited by the facts of the case, are frequently inadequate to deliver predictable rules to the commercial sector who are attempting to manage risk in their future endeavours. Onerous processes of initiating an action for infringement and dramatic reduction of available statutory damages are equally unsatisfactory. ***For the business-community, the judicial approach is no substitute for clear scope and clear consequences incorporated in legislation.***

Rights holders will only make their works available in Canada if they are confident that their economic and moral rights will be protected. Our knowledge economy is ill served by suggesting that the creators, the rights holders, the publishers, the producers are … the “bad guys”. It is equally ill served by

encouraging the notion that copyright is a zero-sum game whereby any protections given to the creator somehow deprive the user and are, therefore, contrary to the public interest.

A healthy creative community supports a vibrant knowledge economy. A copyright regime that undermines the creators' ability to be remunerated for their creations will poison the well.

Introducing the Canadian Publishers' Council and the Canadian Educational Resources Council

The Canadian Publishers' Council (CPC) was founded in 1910. As Canada's primary English-language book publishing industry association, we represent the interests of companies which publish books and digital and other electronic media for elementary and secondary schools' students and teachers, colleges and universities' students and faculty, the professional (law, medicine, accounting) and reference markets, and the retail and library sectors.

Our members have much at stake in Bill C-11, Copyright Modernization Act. CPC member companies continue their commitment to the Canadian knowledge economy:

- Our member publishers employ nearly 4500 Canadians.
- In the most recent calendar year, members paid more than $50 million in royalties to Canadian authors.
- More than three-quarters of all new and original Canadian works published in Canada annually across all educational disciplines and across all genres (print and electronic) are published by CPC member firms.
- These works and imported books represented in the Canadian market by our members account for nearly three-quarters of all annual domestic sales of English-language books.
- Our member publishers deliver $70 million of business annually to Canadian-based book print production and many millions more to rapidly growing digital development.

The Council represents the Canadian publishing community on the international level in the International Publishers Association (IPA) and is a member of the International Federation of Reprographic Rights Organizations (IFFRO). The CPC also maintains liaison with other Canadian professional publishers' associations, with the Association of American Publishers and the U.K. Publishers Association, as well as with Canadian colleagues in all areas of the literary arts, educational, library and retail communities.

As noted above, our members make a hugely significant, and ongoing, commitment to and investment in Canadian creative and cultural resources and entertainment for Canadians of all ages, from coast to coast. CPC was active at all the roundtables and on the working group for the **Canadian Digital Information Strategy / Stratégie canadienne de l'information numérique** (Library and Archives Canada) released in spring, 2008.[2]

[2] Improving Canada's Digital Advantage: Strategies for Sustainable Prosperity, Consultation Paper on a Digital Economy Strategy for Canada, 2010

CPC participated as an intervener in CCH, the key Supreme Court of Canada decision on many copyright issues, and, along with CERC, was an intervener at the recent Federal Court of Appeal hearing on the El-Hi copyright tariff.

The Canadian Educational Resources Council, which grew out of the "School Group" of CPC in 1998, is the association of major publishers of educational resource materials for Kindergarten to Grade 12 schools in Canada. CERC members design, publish and market specifically Canadian materials --in print and digital formats -- to meet the changing curriculum requirements of the Ministries of Education across Canada. To complement these products, our members offer teacher training and produce assessment materials.

CPC and CERC intercede, not only on behalf of our members but as dedicated Canadians who believe in the irreplaceable value of our writers, our poets, our singers, our composers, our artists, our sculptors, our photographers and all those who contribute to the information industry, the gaming and software industry, our great tradition in theatre and movies and, of course, our indigenous publishing industry. Copyright protection is the lifeblood of all of these - without them, there is no Canadian culture to consume.

Specific Comments on Copyright Reform

CPC and CERC recognize that the Government of Canada is committed to digital economy objectives (as stated in the government's digital strategy consultation paper) of which the modernization of the copyright regime is an important underpinning. Therefore, it would seem essential that modernization contribute to the vitality of the knowledge economy by ensuring fair remuneration for creators and publishers to incent creation as well as to ensure investment in new and expanded opportunities. This will provide consumers with access to more creative works.

For the most part, we endorse the key objectives laid out by the government for Bill C-11. Backgrounder information and preambles (such as those that accompany the Bill and its predecessor Bill C-32) improve the ability of Canadians to interpret the scope and intention of provisions. We reiterate, however, that the proposed changes to the copyright legislation need to reflect those objectives in a clear and effective way[3].

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[3] Canada's Copyright Act, passed originally in 1924, has no purposive statement (http://www.pch.gc.ca/progs/ac-ca/progs/pda-cpb/faq-info/index_e.cfm). The legislation attempts to reflect a hybrid regime of common law and civil law concepts that is the common law "industriousness" model and the civil law creativity or personality model. Gonthier, in dissent in Théberge (Théberge v. Galerie d'Art du Petit Champlain Inc. [2002] S.C.R. 336 at para 116), refers to this hybrid nature:

> Moreover, it is important to recall that Canadian copyright law derives from multiple sources and draws on both common law tradition and continental civil law concepts.

In the common law or economic approach, the public interest in the dissemination of knowledge is to be balanced against the public interest in access. In the civil law approach, the private interest of the creator is to be balanced with the public interest in access (Brunet, remarks at AGM, Access Copyright, 2008). The inclusion of moral rights in the legislation is a clear reflection of the importance given to the private interest of the creator as reflected in the civil law tradition.

In that context, we challenge an unbridled expansion of exceptions — from adding the fair dealing purpose of "education", to the proposed addition of multiple new user exceptions. We firmly believe that such a legislative approach and its negative consequences (intended or unintended) will sabotage the delivery of the Government's stated objectives for copyright modernization.

A. Copyright Owners – New Rights and Protections

Modernization and alignment with international standards require some new protections for creators of Canadian content. These for the most part fulfill the government's objective to implement the World Intellectual Property Organization (WIPO) treaties - the Copyright Treat (WCT) and the Performances and Phonograms Treaty (WPPT)[4].

We would be pleased with the introduction of the distribution right relating to tangible works and the clarification that the making available right for authors is part of the right of a rights owner to make the first communication to the public. To avoid suggestion that there is different treatment between copyright in a work and copyright in a performer's performance as to the making available right and the distribution right, would it not be preferable to use the same construct and language?

The provisions on technological protection measures (TPMs) need to be consistent with international standards. Reasonable exceptions to the prohibition on circumvention could be incorporated (law enforcement and national security, creating interoperable computer programs, encryption research, protection of personal information, computer and network security, enabling persons with perceptual disabilities to access materials, enabling consumers to protect their personal information, temporary recordings made by broadcast undertakings and for unlocking a wireless device). C-11 also proposes enabling the government to enact regulations to expand exceptions "in the public interest". There must be governing principles included in the Bill to limit the scope of exceptions that could be created through regulation, rather than a list of non-exclusive factors. Making such a provision open-ended is of real concern because it could result in exceptions being added that misalign Canada with the standards of the international community. A provision requiring a rights holder to provide access to a work to anyone entitled to one of the exceptions to the prohibition on circumventing a TPM needs to be counter-balanced (similar to an EU Directive) with requirements on the user wishing to take advantage of such an exception to protect against unauthorized downstream use of the work.

Protection of digital rights management information (DRM) needs to be included and be consistent with international norms. Metadata protection is an important underpinning of copyright works in the digital economy. It ensures that the intangible work has a persistent connection with author or creator. It can also be a vehicle for pre-determined terms and conditions as to use and attribution. DRM is a form of technological protection measure that enables access but defines permitted uses and ensures attribution. IF DRM information is not protected (and effective) rights holders will be forced to use digital locks resulting in less access to copyright content.

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[4] World Intellectual Property Organization, WIPO Copyright Treaty, (1996) http://www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html at para 131, World Intellectual Property Organization, WIPO Performances and Phonograms Treaty, (1996) http://www.wipo.int/treaties/en/ip/wppt/trtdocs_wo034.html

Proposed protection of TPMs and DRMs is gratifying as many business models for creative works depend on TPMs. There should, however, be sufficient protection for copyright included through clear scope of exceptions, enforcement provisions and available compensation for damages so that it is not a commercial requirement to resort to TPMs, (somewhat antithetical to a publisher's raison d'être which is to "make available") .

We recommend extreme care in the definition of any exceptions and recommend that effective means to control infringement be ensured so that TPMs do not have to be an essential part of a business model.

B. Users – New and Expanded Exceptions

At a time when end-users have more access and more flexibility than ever and the creator community is grappling with a rapidly changing business environment, the government seems to deem it necessary to provide additional end-user exceptions. The reality is that every exception to copyright has the potential to reduce incentive to invest in the publishing process, to reduce innovation, to reduce author royalties, to reduce employment and to reduce output of indigenous intellectual property. Is it possible that the government believes these outcomes to be reasonable as long as <u>immediate</u> user demands are satisfied?

The stated intent of the government in relation to the new exceptions is to provide technological neutrality but at the same time to define permitted user activities that derive specifically from technological developments. Exceptions should be added with great care that the activity being excepted is truly required to maintain a "balance" in the market. The Berne three-step test (Article 9(2))[5] is the international standard against which Canada should be measuring the proposed exceptions. This test imposes specific conditions that must be met before exceptions or limitations can be introduced into national law:

a. An exception represents “certain special cases”;
b. A reproduction pursuant to an exception does “not conflict with a normal exploitation of the work”; and
c. The exception or limitation does not “unreasonably prejudice the legitimate interests of the author.”

In this framework, CPC and CERC firmly believe that the inclusion of "education" as a purpose in fair dealing and the expansion of existing educational exceptions is contrary to all three of the steps set out above. Education is a broad concept and its scope is not articulated. It appears, however, that the government intends to include not just elementary, secondary and post-secondary institutions and students (and all the roles within institutional environments) but also skills training, life-long learning, corporate training, etc. Scope will need to be determined in the judicial forum and that fact will impact the willingness of investors, such as the educational publishers who are members of our associations, to commit, long-term, to development of Canadian educational content.

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[5] Berne Convention of September 9, 1886 for the Protection of Literary and Artistic Works, 1 B.D.I.E.L., Commerce Clearing House, Inc., 711

<u>If publisher investment is driven from the Canadian market, Canadian students will be left with only foreign-created education material for the delivery of learning — not the government's vision of a successful knowledge economy.</u>

➢ Undermining of Collective Management

One of the consequences of a strategy to add multiple new exceptions, apparently intended, is to repudiate collective licensing as a tool to maintain market balance and serve user access needs. Collective licensing has developed worldwide to address the volume and complexity of permissions for re-use. It is a system of pre-approved permissions for types of uses that, without that permission, would be infringement of copyright. It must be recognized that re-use has been a growing consumer activity, driven by ever-improving reproduction technologies. Collective licensing is a sensible, flexible and reasonable model. It maintains equilibrium in the marketplace for the creator community, replacing some loss of direct revenues with licensing royalties — the users obtain uses of defined portions of works at fair cost.

Exceptions undermine the role of collective licensing in the context of education and in the library environment. Institutional collective licensing has greatly expanded the opportunities for users to enjoy creative works in new ways without depriving the creators and rights holders of permissions revenues. Without licensing and under the proposed new exceptions, the library and education sectors will be delivering content into the hands of users with no compensation to the creators of that content — <u>at least until the supply of new creations and content dries up</u>.

We need to remind ourselves at every juncture of the original purpose of copyright and ensure that that purpose is not sacrificed for public policy objectives that relate not to access or use but to saving money for two information-consuming sectors. This is pure expropriation from the creative community.

➢ Fair Dealing Purposes

The government has proposed adding three additional purposes to the fair dealing exception – parody, satire and education.

- ***Parody and Satire***

These purposes are in their nature transformative resulting in the creation of new works. The question of "fair" still needs to be determined and if a use is unfair then it will be infringing.

- ***Education***

Including education as a purpose for fair dealing is globally unprecedented and contrary to our international obligations. As noted earlier, it is also in direct conflict with many of the government’s articulated objectives for copyright and for the knowledge economy. In the long term, the breadth of this proposed expansion of fair dealing could cause irreparable damage to the Canadian creative community and, in particular, to the educational and STM (scientific, technical, medical and scholarly) publishing sectors (the more so in combination with the expanded interlibrary loan exception).

Damaging these sectors of the Canadian information industry can only result in reducing available, original Canadian content.

When addressing the scope of educational exceptions the government position, in the past, has been that the interests of society were best protected by providing fair and reasonable compensation for educational uses through a partnership of licensing and tariff setting, as such a regime would provide access while protecting rights holders' economic interests and ensuring fair and reasonable compensation for access to material.[6] In the experience of our members there has been no impediment to access for educational purposes and the Copyright Board has proven itself competent in establishing tariffs related to educational uses.

There is no market failure that justifies the addition of this purpose. Conversely, the addition of this purpose would most certainly cause market failure. The reason for its inclusion is clearly stated in the government's fact sheet on Bill C-11 — ***money***. Unlike any other business sector or service provider involved in the provision of "education", the creator is being deprived of compensation currently earned through direct compensation and through collective licensing in order to save financial costs for the education sector.

The government clearly states that it believes that this purpose

> …will permit individuals and businesses to make certain uses of copyright material in ways that do not unduly threaten the legitimate interests of copyright owners…Extending this provision to education will reduce administrative and financial costs for users of copyrighted materials that enrich the educational environment.[7]

These statements are problematic — "unduly", "legitimate interests", "costs". Using the Copyright Act to implement a social policy of preferential economic treatment to a public purpose by taking away legitimate rights of creators and publishers to be remunerated for the use of their works is just unfair and short-sighted — even more so because it may cause the complete collapse of the compensatory system of collective licensing that protects the rights holder in a market where copying is pervasive.

This purpose also does not align with all other "purposes" in the fair dealing exception; individuals perform these. An "education" purpose could be individual or institutional. There are no transformative works created in this case as in the other fair dealing purposes — the provision permits the exact reproduction of all or part of a work as long as the copying is considered "fair". "Fair" relates to the individual's purpose and motive for using a copyright work. In education, the assessment of "fair" would have to relate to the aggregate use of the work; use is not just one copy but many, for and by many individuals or institutions. How could the breadth of the use be determined, much less the damages suffered? The expense and uncertainty of outcomes in litigating infringement where economic damage must be proven in order to establish that an act was not "fair" is gravely concerning to the publishing community.

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[6] Standing Committee on Canadian Heritage, "Interim Report on Copyright Reform" (2004) at p. 17

[7] *What the Copyright Modernization Act Means for Teachers and Students,* government fact sheet dated September 28, 2011. We were told that the new fair dealing educational exception was meant to be limited to uses in a "structured learning environment", but not necessarily by educational institutions as currently defined in the Act.

The government's FAQs and backgrounders for Bill C-11 suggest

1. that education relates only to structured settings

   [Comment: that is not how it is defined in the Bill], and

2. that this expanded purpose will do no harm

   [Comment: it will clearly harm markets — directly through lost sales and lost investment in new projects and indirectly through the decimation of the collective licensing option].

This is as an assault on the creator, rights holder and publisher right to realize a return on creative efforts and investment in those efforts.[8]

International Norms for Educational Purposes

What is the reaction of the international community to this expansion of fair dealing? Our international colleagues are unanimous that the new purpose is in conflict with Canada's obligations under the Berne Convention, the TRIPS Agreement[9] and the WCT.

CPC and CERC emphasize the importance of the 3-step test, which we set out again:

a. An exception represents "certain special cases";
b. A reproduction pursuant to an exception does "not conflict with a normal exploitation of the work"; and
c. The exception or limitation does not "unreasonably prejudice the legitimate interests of the author."

As currently proposed, the fair dealing purpose of education could apply to all educational works and to all copying done for education and to all uses of that copied material in the process of "educating" (as long as it is "fair", a judicial determination); therefore, it cannot qualify as a "certain special case". In comparable legislation of our international treaty partners, education is defined narrowly e.g. teaching, classroom, scholarship or research, or there are quantitative limits specified as to the amount of a work that can be copied. According to government fact sheets "education" is intended to include life-long learning, skills training, commercial sector training - almost any exchange of information could seemingly qualify as "education" and, therefore, be entitled, as a purpose, to use of copyright works for fair dealing.

When you combine this expansion of fair dealing with the proposed amendments to educational exceptions and the proposed exception for publicly available material on the Internet, the negative impact on educational and journal sectors of the publishing community will be unprecedented – ***<u>whether the works are domestic or international</u>***.

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[8] It must also be noted that there is a significant imbalance in economic ability to challenge these exceptions in court. The creator who challenges a use or seeks a court's definition of scope may face prodigious resistance from the educational and library communities who seem more disposed to spend extensively to challenge a creator in court but not to pay for use of a creator's work.

[9] Agreement on Trade-Related Aspects of International Property Rights, http://www.wto.org/english/docs_e/legal_e/27-trips.pdf

Amendments and Additions to Existing Educational Exceptions

- ***Reproduction for Instruction***

The current Act addresses "reproduction for instruction" with specific "technologies" permitted - flip chart, board, projection. According to the fact sheet for Bill C-11, to achieve technological neutrality, these formats have been removed and replaced with "display". This term is not defined as to scope or as to location. Is it only the reproduction that has to take place on the premises or is it also the display? If the Government's real intent is to replace the concept of an overhead projector with the display of a PowerPoint used in class that should be made clear. As drafted for Bill C-11, it is not a far-reaching interpretation to read this amendment as permitting a copy of a work to be made and "displayed" to all the schools in a school board or a province or a network of organizations or hundreds of student households.

This possibility is reinforced elsewhere in the Bill as the scope of premises is very broadly defined in the "lessons exception" to deem a student to be "on the premises" ***anywhere*** as long as he is receiving a transmission from the educational institution.

"Display" needs to be clearly defined. This term, particularly with new, digital technologies, contemplates any visual use of a work. It would be inequitable to permit scanning and copying of entire works onto course websites or to servers, thereby permitting access for use in class, libraries or elsewhere.

There need to be restrictions on what the student can do with "displayed" reproductions.

CPC and CERC note that reproduction for instruction covers use in intangible forms and so, at a minimum, it should introduce the accountabilities present in other exceptions e.g. the lesson exception.

Any exception around reproduction for instruction must be unavailable if the work being reproduced is "commercially available". This also needs definition as to whether the work must be available in the exact format desired by the institution. If so, this will force educational publishers to anticipate every option, at great cost – or, to anticipate no options at all. Of importance as well, availability through a collective licence should constitute "commercially available".

- ***Lessons***

Clarity and scope are key issues in the possible expansion of this exception. The lesson needs to be non-infringing and institutions should be obliged to take "reasonable" measures to limit the distribution to enrolled students. "Reasonable" measures need to be defined. As drafted for Bill C-11 the exception permits students to reproduce the lesson in order to time-shift. The obligation to destroy the lesson after final course evaluations is unenforceable and could better be a requirement to retain for personal use only. There must be an explicit restriction on circumventing a technological protection measure in order to reproduce or rights holders are left with no protections and no remedies.

- ***Reprography***

The government would seem to want to allow institutions to scan and digitize works to the same general nature and extent as the reprographic reproduction authorized under a collective licence but

not if there is a digital licence in place. Since the royalties deemed to be payable are the same as they would be under a print collective licence there would be no incentive for the institution to enter into a collective licence for digital works.

Damages are proposed to be limited to what would have been payable under the licence. Effectively this makes it a compulsory licence – with no base amount being payable. The royalty would only be payable if the work were communicated by telecommunication leaving a gaping loophole if the digital copy is distributed in other media such as CD, DVD or memory key.

Challenges that need to be addressed for such an exception are as follow:

- An institution must be required to take measures to control the use of the work and there must be consequences specified if it does not (effective drafting would deny the protection of the exception if "measures" were not taken),
- The concept of "reasonable" with respect to "measures" should be used consistently and it should be defined.

There are no known international precedents for an exception of this magnitude. Even where there are statutory licence regimes (Singapore, Australia, Denmark) there is a cap on the percentage of the work that can be reproduced digitally.

Furthermore, there need to be effective remedies, simplified process and appropriate damages.

- ***Publicly Available Material on the Internet (PAM)***

The educational community has been pushing for this exception for several years - the right of a user in the educational community to take "publicly available material on the Internet". There is no international precedent for an exception of this type and this breadth.

As envisioned in Bill C-11, it applies to any work; any subject matter so could apply to entire websites, databases and complete works. The works can be subject to copying and other uses by institutions, transformative or not. Although attribution is required, there are no other limitations. There would seem to be no restriction against downstream copying of these works using the private copying exceptions and there is no safeguard against such downstream distribution of the works.

This proposed exception fails to meet the objectives of the government on all fronts. It is out of step with international standards, it violates our obligations under key treaties, and it is unfair and commercially damaging to rights holders. If it initially meets the educational community's needs, it will only do so only until the rights holders impose terms and conditions that clearly state permitted uses or implement TPMs to control access. This will result in less available content for the Canadian educational community.

As if there were not enough concerns about this proposed exception, the nature of the copyright notice required to avoid the exception would be defined by regulation – this lack of predictability will be a further disincentive to publishers to put works on the Internet.

International copyright owners are extremely disturbed by this proposal as much of their content will also be subject to the exception and it clearly fails the Berne 3-step test.

There is no justifiable reason to treat copyright material on the Internet differently than it is treated in any other media.

Definition of "Publicly Available" (PAM)

To avoid content being considered "publicly available" Bill C-11 suggests a clearly visible notice prohibiting use – not merely a copyright symbol – is required. This would seem to be a clear violation of the Berne Convention Article 5(2), which states:

> The enjoyment and the exercise of these rights shall not be subject to any formality.

The existence of copyright should be assumed where there is no formal notice but this provision, as drafted, states that not even a copyright notice will suffice to ensure a copyright owner's rights are acknowledged. ***This approach ignores the realities of most Internet sites. Terms and conditions are often exclusively on the home page or buried in descriptive content. Copyright notices may apply to the site, the design and have nothing to do with content. Equally, copyright may be asserted on some components of a site and not others. Portal sites are an excellent example of this situation. On many sites, the terms and conditions of use are invisible to a user who follows a "deep link" to a piece of content.*** Are copyright owners going to be expected to anticipate website design challenges and inter-site linking over which they have no control?

What is "published"? What is "expectation of payment"? What is "access" vs. "availability"? There are innumerable examples of "accessible" material on the Internet that is not intended to be reproduced.[10]

Last, but far from least, **no instruction on copyright or intellectual property is required to take advantage of the exception**. This proposed provision not only subverts long-standing copyright principles, it does so in a way that will result in students leaving educational institutions feeling that all content on the Internet that isn't locked up is theirs to take. Where are students going to "learn" that when they leave the educational world their entitlement to material on the Internet is no longer protected by the "PAM" exception?

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[10] For example:

- **Circulation to peers.** One of the original uses of the Internet was to facilitate peer review of "works in progress". There is no expectation of payment but imposing TPMs impedes that peer review exercise. PAM could result in early versions of research being widely and prematurely disseminated or used in the educational community.
- **"Educational" sites sponsored or supported by advertising.** Those funds will disappear quickly if the content is excised from the "wrapper" and the sponsor or advertiser gets no exposure for its investment. Without the funds, there will be no content.
- **Self-promotion.** Photographers, writers, consultants promote their work. Complex TPMs will be necessary to preclude losing the works into an uncontrolled environment and losing their value for economic exploitation – making a living.
- **Multi-media.** The drafting of this section ignores the complexity of the works available on the Internet – a single work may combine many visual and audio elements.

(From a study prepared for the Working Group by Catherine Campbell, entitled *A Report on Publicly Available Material on the Internet: An Examination of the State of the Internet* (the Campbell Report) - **Copyright and the Educational Use of Internet Content, Working Group's Report -** http://strategis.ic.gc.ca/eic/site/crp-prda.nsf/eng/rp01116.html**)**

➢ Amendments and Additions to Existing Library, Archive and Museum Exceptions

• *Management and Maintenance of Collection*

It has been proposed that there be a right of libraries, archives and museums to copy a work because format or technologies required to access it are obsolete or unavailable in the belief of a worker at any of the institutions. There is apparently no accountability if that belief is not reasonable.

• *Interlibrary-Loans*

The government seeks to "modernize" inter-library loans by adding "digital". This supports a model where libraries can pool resources for newspaper and periodical subscriptions and provide on-demand delivery through the Internet, email or other online access. This will unquestionably reduce the number of subscriptions for hardcopy versions of these materials but will also affect the development of new business models providing digital versions and online database access. The reduction of revenue to the publishers of STM journals, newspapers and magazines, in particular, will result in the cessation of publication of many specialized works. ***Libraries are a significant part of the market — only one of them will need to purchase a subscription with this "technology neutral" expansion.***

At a minimum there must be responsibilities put on the libraries to reduce the potential market impact.

- Follow-up test to ensure that copies are not redistributed
- Way to confirm that the patron's digital copy is destroyed as required
- Record keeping is required
- Limit on the frequency of use of the exception by a participating library or patron
- Clarity as to whether the patron could rely on other exceptions to format-shift, post to the Internet or use as a basis for non-commercial user-generated content.

The library's responsibility to take "measures" should be clear. However, if it can be established that NO measures, or no reasonable measures, have been taken, the library should not be able to rely on the exception.
Anything less would be a very low standard.

The market impact of expanding library exceptions to encompass digital reproduction and circulation has not been assessed. Ironically, there was supposed to be a formal review and assessment of the existing inter-library loan impact 3 years after the Copyright Act was amended in 1997. It did not occur. We still believe that the formal review and assessment is required. Therefore, we recommend that the provisions in the current Act be retained, augmented by effective record-keeping requirements pending that assessment.

• *Non-Commercial User-Generated Content Proposed Exception*

Technology has created a consumer demand to be able to use copyright works as if they were in the public domain for the creation of new works e.g. mash-ups of video clips or using popular music with home videos. This provision, as drafted in Bill C-11, is unprecedented in scope, worldwide – the second example we saw of this in C-11 with the first being the proposal to make education a fair-dealing purpose. The exception imposes no limits on the amount of the copyright work used – an album or a television series. In theory, the use must be "non-commercial" but the individual can disseminate the work on commercial sites, ergo the name, "YouTube exception". The proponents of the proposed

exception seem completely oblivious to the impact of such uses on the economic and property rights of copyright owners but also the impact on their moral rights.

This exception permits compilations to be considered “transformative” e.g. a collection of detective works.

To qualify for this exception no legal ownership or legal licence of the source file is required unlike other private use exceptions.

Supporters defend the exception on the basis that the work created must be “original”. However, Canadian courts have established a relatively low standard of originality. In CCH, Madam Justice McLachlin set out the two polar positions for defining “originality”: on one end that the work must be creative to be “original” and the other being the “sweat of the brow”, industriousness standard that requires only an author and effort. She concludes that the correct definition of originality is somewhere in the middle:

> It must be more than a mere copy of another work. At the same time, it need not be creative, in the sense of being novel or unique. What is required to attract copyright protection in the expression of an idea is an exercise of skill and judgment.[11]

It must be noted that compilations were part of the subject matter of CCH and these were found to be sufficiently original to earn copyright protection. There is no limit to the scope, quantitatively or qualitatively, of the use of the copyright work in this provision except that it be non-commercial.

Under this proposed exception the "author" of the user-generated content is extended all exclusive rights of an author under the Act in the creation of a new work – the user-generated content is copyrightable but ***the right to exploit the work commercially is denied***. However, the individual can disseminate (not defined) the work through intermediaries who may be commercial site operators, generating indirect revenue from such content through advertising and potentially achieving a wide audience — with no compensation to the original rights holders or creators.

Most disturbing is that the burden of proving that the new work <u>does</u> have an adverse effect on the original is put on the original copyright owner — the standard of proof is onerous and would seem to be yet another example of a provision that flies in the face of the Berne 3-step test. The provision does not take into account compensating the rights owner for the damage done to the future market of the original due to the dissemination of the "new" work.

➢ Private Uses by Consumer Exceptions

These proposed exceptions purport to "define" what users can do with copyright content with all the new technologies at hand – in a technologically neutral way. The proposals fail because they require an ability to regulate end-users, something the original Copyright Act drafters never envisioned. They fail to reflect the potential consequences to a rights holder market (those same end-users) if the exceptions impact on the exploitation of the original works. They absolutely fail to deliver effective means of enforcement.

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[11] CCH Canadian Ltd. v. Law Society of Upper Canada [2004] 1 S.C.R. 339 at para 16, Feist Publications Inc. v. Rural Telephone Service Co. [(1991),] 111 S.Ct. 1282

The one positive in the government's current vision of these new exceptions is that a user cannot break a "lock" in order to take advantage of these exceptions.

- ***Reproduction for Private Purposes (Format Shifting)***

As drafted in Bill C-11 this provision is yet another that is unprecedented in scope, worldwide, (the third in Bill C-11). The exception would seem to permit a user:

1. to make unlimited copies of any content whether the source-copy for this copying be either "owned" or "licensed", and
2. to store those copies on any number of devices or networks including Internet PVRs, cloud storage or storage lockers, which permit shared access, and potentially uncontrollable infringing copying.

Clarity is required in defining private purposes or uses since as drafted in Bill C-11 it is arguable that private purposes could include the making of copies for another user's private purposes. **The term "private purposes" suggests greater flexibility than the preferred term "private uses"**. Additional clarity is required to ensure that a "giving away" protection addresses giving away tangible and intangible copies and the destruction requirement applies not only if the source-copy is sold — but also the resulting copy. Protections such as not permitting copies where an online contract precluding them exists and not allowing a copy to be rented or distributed (secondary infringement) need to be included.

Legal experts have conjectured that this exception could be construed to permit the transfer of entire libraries of files to other individuals and that, of course, does nothing to impede peer-to-peer activities.

- ***Fixing Signals and Recording Programs for Later Listening or Viewing (Time Shifting)***

As in the previous exception, protections must be clearly articulated such as restriction on public storage to which others are given access and a prohibition of a person making a copy for someone else's private use.

Again, the scope of "private use" needs to be limited to the "private use of the maker of the copy" so that a user would not be able to collect a library of programs by simply making copies.

- ***Backup Copy Exception***

The stated intent of this exception is to allow users to backup vulnerable media but the scope, as drafted in Bill C-11 seems to permit unlimited "backup" copies of content. The purpose of backing up media vulnerable to damage or destruction needs to be tempered by restrictions on uses such as loans and licence and formats.

C. Intermediaries - ISPs

The Supreme Court of Canada articulated a concern around impeding the role of intermediaries in their facilitation of end-user access. Unfortunately, the current technological landscape has become more amorphous and volatile than that of 2004 when the CCH decision was written. However, even then, the Court recognized that intermediaries are not always neutral and effective remedies need to be available:

> notice of infringing content, and a failure to respond by "taking it down" may in some circumstances lead to a finding of "authorization"…A more effective remedy to address this potential issue would be the enactment by Parliament of a statutory "notice and take down" procedures as has been done in the European Community and the United States.[12]

The Court was not insensitive to the challenges the Internet technology poses to the traditional copyright professionals since the Internet, unlike previous new media, facilitates the end-user becoming a disseminator as well as a user. However, according to the Court, Parliament intended to distinguish between abusers of the Internet and the actual Internet infrastructure.

> It is clear that Parliament did not want copyright disputes between creators and users to be visited on the heads of the Internet intermediaries, whose continued expansion and development is considered vital to national economic growth.[13]

The government's technologically neutral objective does not seem to accommodate the changing nature of the intermediaries such as ISPs. New models of ISPs have made it almost impossible for rights owners to curtail infringement.

Bill C-11, as drafted, envisioned four very broad safe harbour exceptions for internet intermediaries and network providers - network services, system caching, hosting services and information location tools.

These exceptions are open-ended and support infringing entities. Standard conditions that are part of international norms for ISPs were not included. The provisions are not limited even if the service provider is aware of infringing activities; there is no requirement to take down the content or disable access and there is no requirement to conform to generally accepted industry practices in order to get the benefit of the exceptions — as is the case in other WIPO countries.

CPC and CERC recommend that the government revise these provisions to ensure, at a minimum, that ISPs comply with industry "best practices" in order to benefit from the protection of any exception.

Network Services

International standards that guarantee that an intermediary is truly just that should be considered. For example:

- The transmission of the electronic copy of the material is initiated by a person other than the network provider.
- The transmission is carried out through an automatic technical process.
- The network service provider does not select the recipients of the electronic copy.
- The network service provider does not make any substantive modification to the content.
- Transient storage takes place for the sole purpose of carrying out transmission and is not stored for any period longer than is reasonable for that transmission.

[12] Society of Composers, Authors & Music Publishers of Canada v. Canadian Association of Internet Providers [2004] 2 S.C.R. 427 at para 127
[13] Ibid. at para 131

In the US and in Australia the service provider must adopt and implement a policy to prevent use of its service by repeat infringers.

A vague approach will not deliver the government's stated intent to limit this protection to true intermediaries.

➢ System Caching

The approach to system caching is also broader than international norms. It is not subject to the enablement provision that is introduced in Bill C-11. Files can be cached even if the service provider is notified that the material has been removed or a court has ordered removal. There is no requirement that the ISP have a policy in place to prevent use of its service by repeat infringers.

➢ Hosting Services

ISP hosting services need to act as neutral intermediaries in order to earn protection from liability for infringement. If not, there is potential to create a safe harbour for websites that permit/encourage third parties to upload infringing content. The hosting entities should not receive a financial benefit from the activity of the infringing user, as is norm in international regulation. This provision, as drafted in Bill C-11, requires that the hosting provider have actual knowledge of a court order that there has been infringement in order to be expected to act — a much higher standard of notice and proof than expected anywhere else in the Act. ***At a minimum, financial benefit from the infringing user should preclude the ISP from relying on this exception.***

➢ Information Location Tools

It is not entirely clear what this exception is intended to accomplish. It could, as drafted in Bill C-11, be a safe harbour for pirate services where the website operator would cache third-party content, provide indexing and search capability and provide transmission of files to members of the public. Is this an intended or unintended consequence – the support of file-sharing services? Actual or constructive knowledge of infringing material should void the safe harbour. There must be a requirement that there be a policy established by the ISP to prevent use of services by repeat infringers.

D. Enforcement of the Rights of the Creator

➢ Change in Distribution Model

There has been very little attempt in past amendments of the Copyright Act to regulate the end-user who in the analogue world is the end of the distribution chain. Gervais notes that the Copyright Act was never intended to control genuine end-user activities:

> Copyright issues should ideally be dealt with elsewhere in the distribution chain (e.g. at the level of distributors and databases), not in the hands of end-users.[14]

[14] Gervais, "The Purpose of Copyright Law in Canada" (2005) 2:2 315 at para 17

The government has demonstrated no awareness of this reality. Now, courtesy of new technologies and exacerbated by many of the exceptions discussed above, rights holders have been given no choice but to confront their "customers"!

This imbalance is compounded by the drastic reduction of government support for the essential intermediary role of the collective licensing solution, as used internationally.

Notice-and-Notice

This is the most "neutral" approach that could be adopted with respect to assisting copyright owners in removing infringing content from the Internet. It requires that a notice — with almost impossible levels of detail — be provided to the ISP who will then forward a notice to the alleged infringer. The ISP needs to maintain records to establish compliance with the notice requirement but the time periods are completely unrealistic in the context of normal litigation time frames.

Remedies are limited to statutory damages of $5-10,000 if the ISP fails to take the required steps. This is completely inadequate for the rights holder. There is no form of injunctive relief available. Further, there is no graduated response for multiple offenders as is implemented by many other jurisdictions.

There must be some injunctive relief and a final option that is "takedown". This should not be different from removing infringing analogue material off the bookshelves – an option that is available as a form of injunctive relief today, as well as a final outcome.

CPC and CERC are looking to the government for a system that endorses graduated responses and that facilitates a rights holder having access to injunctive relief to mitigate the damage to the work.

Enablement of Infringement

The concept of enablement was introduced in Bill C-11 as a new cause of action against a person who knowingly provides a system that is "designed primarily to enable acts of copyright infringement". The following issues need to be clearly articulated in any reform:

- What is the scope of "primarily designed" to enable acts of infringement? Would a service that combines non-infringing with infringing acts escape?
- What is enablement vs. facilitation – many pirate sites do not "enable" all elements of the infringement so will escape the application?
- Why are statutory damages not an option for these provisions?
- Will it apply to non-commercial or non-profit entities that are "enabling" infringement?

Practical Impact on Enforcement

The distribution chain is now multi-pronged with copying and redistribution occurring via the original end-user. Regulation of unpredictable and fragmented end-user activity is an impossible task.

A society needs to internalize values, particularly so where enforcement is almost impossible. Societal respect for copyright and for the integrity of creative works was a major factor in limiting infringement in the past. Cynically, it might also be said that the lack of means to reproduce copyright works was the primary factor.

Today, end-users have a sense of personal entitlement to copy and reuse copyright content that should be as large a concern for the government as it is for the rights holder. There is a disturbingly large and vocal group of individuals amongst Canadian consumers that rationalizes “rights” to consume and use at will with no obligation to compensate creators e.g. that musician can go and perform another concert, other people are buying that movie, newspapers should be "free". There is no indication that this user community will constrain its behaviour by an “honour system”. So how does the government respond to this consumer trend? It approves it. ***In Bill C-11, the government proposes to provide exceptions to permit already out of control infringing behaviours***.

Further, where there is an end-user "infringement", it will be virtually legitimized if the infringement is carried out for non-commercial purposes or without motive for personal financial gain. ***What happened to penalties for infringement where there was an intent to infringe?***

The procedural entanglements resulting from timing of infringements, number of works involved, and number of rights holders will make seeking damages for infringements virtually impossible. The “privacy” of the infringer and the sheer number of infringers makes the identification of the infringement and the infringers (in the detail required) an insurmountable task. Simultaneous with the reduction of the likelihood of being "caught" for infringing, the government has drastically reduced the significance of the consequences for infringing. The maximum statutory damage payment obligation is now $5000 for all infringements.

In these provisions, the government would fail to achieve its stated intention to address the harm of “illegal” file sharing to rights owner business models - traditional, current and future.

Purpose of Copyright and Balance between the Creator and the User

The government has clearly stated the goal of modernization of Canadian copyright. However, the government appears to have endorsed a strategy of adding exceptions to accommodate user expectations of the "right" to maximize the potential of new technologies — this strategy needs to be weighed against the real purpose and the overall public benefit of copyright — to incent the creator in order to ensure access to their works for the public good. Public good is not the same as user expectations.

How have we arrived at this point — where everything in the Copyright Act seems to have become a "balancing" of rights between the creator and the user with little reflection on the impact of that approach on the creator's personal (moral) or property entitlements in their intangible creations.

The Supreme Court of Canada, in the 2002 Théberge case[15], began the process of articulating a view of the “purpose” of the Copyright Act. The Théberge [16] decision speaks of <u>a public interest in a balance</u>

[15] Théberge v. Galerie d'Art du Petit Champlain Inc. [[2002]] S.C.R. 336

[16] In Théberge, Mr. Justice Binnie’s reasons address the limits of the creator’s rights but the decision also speaks <u>strongly</u> to the public interest in incenting dissemination.

A. **The Present Balance Between the Economic Interest of the Copyright Holder and the Proprietary Interest of the Purchasing Public Would be Significantly Altered to the Public’s Detriment**.

between the copyright purpose of incenting dissemination and compensating a creator and a new community of rights – user rights.[17]

The scope of user rights is defined, it appears, only by how the scope of the copyright owner's rights is limited. In the end-user community, this articulation of a "user right" has created an expectation and sense of entitlement to access and use copyright works with virtually no consideration for the balancing of the public interest purpose of incenting creators and of ensuring their economic compensation for their works. This no longer correlates (if it ever did) to the balance of public interest justification for copyright protection.[18]

The CCH decision is touted for endorsing and expanding this "balance of rights" doctrine in relation to the breadth of exceptions - the "user right"[19].

> The fair dealing exception, like other exceptions in the Copyright Act, is a user's right. In order to maintain the proper balance between the rights of a copyright owner and users' interests, it must not be interpreted restrictively.[20]

The Court did not suggest that the user right to fair dealing was **unlimited** — the seeker of fair dealing still had to qualify as to purpose (even if those existing purposes might be interpreted generously) and the dealing had to be "fair".

The facts of the case before the Supreme Court in CCH were extremely narrow. That decision revolved around *originality* (whether the works in question were entitlement to copyright protection at all), fair dealing purposes (defining the scope of the named purposes) and **photocopying**. This was a case dealing exclusively with legal publishers' content (mostly English language), not entertainment media nor literature. The "technology" it considered was the photocopier.

The Court did not find that all photocopying by users (whose purpose entitled them to exercise the exception) was fair dealing or, prospectively, that all uses of new technologies would be fair dealing.

> 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 (or, more accurately, to prevent someone other than the creator from appropriating whatever benefits may be generated)….The 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….Excessive control by holders of copyrights and other forms of intellectual property may unduly limit the ability of the public domain to incorporate and embellish creative innovation in the long-term interests of society as a whole, or create practical obstacles to proper utilization.

[17] Ironically, in that decision, the majority of the court found that there was no infringement of copyright so their powerful comments on user rights were completely unrelated to the decision in the case. Nonetheless, those comments reflect the court's view that there was a vacuum in the Canadian copyright regime - that vacuum being that neither the legislature nor the courts, to that date, had articulated the purpose of copyright protection.

[18] Gervais, "The Purpose of Copyright Law in Canada" (2005) 2:2 315 at para 10

[19] "The fair dealing exception, like other exceptions in the Copyright Act, is a user's right. In order to maintain the proper balance between the rights of a copyright owner and users' interests, it must not be interpreted restrictively." (CCH Canadian Ltd. v. Law Society of Upper Canada [2004] 1 S.C.R. 339 at para 48)

[20] Ibid. at para 48

The Court never addressed the question of whether a future explosion of technologies permitting perfect or near perfect reproduction of copyright materials and multiplicity of end-user uses might tip the "balance of rights", as between a creator and "public interest", excessively in favour of the consumer.

Technology has unquestionably introduced new and challenging dynamics. Encouraged by grossly over-stated interpretations of CCH's "user right", the user community's sense of entitlement has expanded in lock-step with the advent of digital technologies. Consumers have vastly greater access to creators' content than ever before, they demand even more — the right to reproduce, re-use and repurpose. The technology has delivered into the end user's hands this ability to copy, share and mash content in ways that were not envisioned by CCH when it spoke to "user rights". ***This re-use of copyright works has become ubiquitous and often completely sabotages the creator's ability to realize economic compensation and personal recognition from the original.***

The Copyright Modernization Act (Bill C-11), as drafted, with its multitude of new and expanded exceptions, seems to endorse the view that any end-user reproduction of works for the utilization of available technology is not an infringement or, if it is an infringement and the purpose is not commercial, there will be virtually no sanction. ***This is not balanced or fair to the copyright owner.***

Recent copyright amendment bills, C-60, C-61, C-32, and the current bill, C-11, all appear to endorse the CCH judicial approach without recognizing that technology now in the hands of the consumer has seriously tipped the balance towards the user.

CPC and CERC remind the government that the Supreme Court of Canada decisions were about more than "user rights" — they were also about **"fairness"** and about the ***fundamental purpose of copyright to incent creativity by ensuring the creator has the opportunity to exploit their works***. None of these decisions suggested that maintaining the proper balance required the addition of multiple exceptions to copyright to satisfy "user rights". The pendulum has swung so far towards the user that, if copyright reform as set out in Bill C-11 is enacted, virtually none of a user's copying, mashing or repurposing will be infringing. ***This will be a disincentive to creativity and it is not fair.***

New Roles — Creator, Rights Owner, Consumer — Intermediaries (Libraries, ISPs, Telecoms)

The accessibility of content and the breadth of user opportunities to consume content that technology delivers have fundamentally changed the relationship between the creator and the user and blurred the roles of creator, end-user and intermediary. The rights owner is challenged by many new "opportunities" in the content world and the evolving roles of the players.

1. The intermediary community, particularly librarians and archivists, see the digital environment as a great opportunity and it is. The Court and the government appear to have endorsed an

expansion of their roles (Bill C-61, SOCAN[21]). Intermediaries are stepping up to be compilers and disseminators in the digital world. Almost invariably, the creation of digital collections is inextricably connected to access and then to disaggregation and to reuse. Copyright and intellectual property are construed as impediments to the public benefit of digitization and enhanced access. This issue, of course, goes to the root of the right to reproduce. It changes dramatically the balance of rights and the opportunities for commercial exploitation by the rights holder.

2. The end-user has developed peer-to-peer distribution systems to share copyright works, perhaps for no individual gain but with ***no compensation to the rights owner who is being deprived of a market.***

3. ISPs and telecoms are exploring models that include enhanced content offerings for their subscribers, preferably at no additional cost to themselves and with ***no compensation to the rights owner.***

4. Search engine services are expanding their information location tools, digitizing content and providing parts of that content – enhancing their services, their user community and the appeal to their advertisers and sponsors. ***This content may far exceed a "fair" amount both qualitatively and quantitatively with the undesired impact on the commercial viability of the content — and with no compensation to the rights owner.***

Needs of the Knowledge Economy — Predictability, Clarity, Manageability

There is no doubt that the copyright businesses, publishers, creators, producers, etc. have been attentive to the approach of the Supreme Court, starting with Théberge. This line of decisions comes many years after the commercial issues that are the subject matter of the cases.

Business decisions have to be made based on projected outcomes and, if the outcomes do not reflect the fundamental principles on which the businesses have relied, there will be negative and possibly fatal economic impacts.

The Copyright Modernization Act makes it seem that the adjudicative process is the forum of choice for the definition of the scope and operation of in the new paradigms of digital access, the internet and technology. However, the outcomes of that judicial process have done more than add to our common law. The rights-based approach that has been used to date has not ended conflict - it has polarized communities, eliminated trust between groups who would benefit by good working relationships, alienated consumers, driven away investment and discouraged innovation.

[21] Society of Composers, Authors & Music Publishers of Canada v. Canadian Association of Internet Providers [2004] 2 S.C.R. 427

More importantly, and it is obvious in the drafting of Bill C-11, the polarization also permeates the policy community, reflected in what has been incorporated into amending legislation.

Current copyright reform discussion perpetuates this adversarial atmosphere and, puts the rights holder in the position of resorting to the court to clarify not only individual users' activities but also the scope of key rights and exceptions:

- to define new purposes in fair dealing,
- to define the exceptions,
- to enforce the protection of technological protection measures, and
- to define and to ensure compliance with ambiguous limits of private uses or educational and library exceptions.

The commensurate cost, coupled with the lack of timeliness and unpredictability of the outcomes, make this a ludicrous proposition. With the proposed drastic reduction of statutory damages, even the most meritorious proceeding will be a financial burden to the individual or business seeking remedies.

> Copyright protection – the right of the copyright's owner to prevent others from making copies – trades off the costs of limiting access to a work against the benefits of providing incentives to create the work in the first place. Striking the correct balance between access and incentives is the central problem in copyright law.[22]

It remains to be seen whether Parliament will internalize the true complexity of the information economy and properly support its needs in forward-looking copyright reform. Canada's stated goal to be a leader in the digital realm depends on it.

Conclusion

Technology has changed one of the fundamental aspects of copyright — as noted above — it was never intended to control genuine end-user activities.

A policy that enshrines end-user uses in exceptions with minimal and vague accountability (and, even more concerning, limited consequences for non-compliance) can only be destructive to the knowledge economy. With the undercutting of existing distribution models (such as collective licensing) and the reluctance of the government to recognize the self-interest of new players (ISPs, libraries, educational institutions) the rights holder is expected to manage rights directly with the end-user at an untenable enforcement cost.

Where is the economic incentive to create intellectual property in Canada when revenue is being expropriated, business models are being gutted and protection for works is so ambivalently stated?

It is also a concern that the "balance" and public good is now clearly represented as being between the creator and the user. There are many different user needs and expectations. Not all of them would be

[22] Landes and Posner, "An Economic Analysis of Copyright Law" (1989) XVIII at p. 326

considered “public good” or in the “public interest”. It will be very difficult to anticipate how the Court will address the inevitable conflict between public good and user rights. The government’s interpretation, however, seems to be that creator rights and public good are always in opposition – yet again the zero sum approach – giving to one automatically takes from the other.

Where is the economic analysis of the competing interests from user groups?

Despite the effort in the proposed copyright reform to be technology neutral there is a regrettable lack of sensitivity to the damaging impact on fundamental copyright principles of the demands of the disparate interest groups. Public policy objectives are driving a special status for education, libraries, archives and museums at the expense of the rights holder. Creator rights and protections are being sacrificed; there is an obvious bias towards "protecting" the economic opportunities of new and questionably-neutral players such as ISPs, telecoms, web search services even if those opportunities are achievable only through uncompensated leveraging of creative and copyright works — without licence or permission,.

Education is a good example of a market segment that is treated in the bill as having competing interests with rights holders. The reality is that the publisher and educator have a symbiotic relationship as developers and consumers of educational materials. The approach of the government in copyright reform begs two questions that clearly demonstrate that connection.

> ***Where is the analysis of the impact of this exception strategy (to save the educational sector money) on the business participants in this market — the publishers?***
>
> ***Where is the analysis of the impact of this strategy on the educational sector if the business participants in this market cease to invest?***

Exceptions that devastate legitimate, existing and developing publishers and business models will do immeasurable harm to those publishers and in the process will reduce Canadian works available and Canadian works accessible to education, to students, to the public. There will also be an impact to the economy of the country in lost GDP.

Where is the clarity of definition, scope and limits for regulation?

Although the government in the Copyright Modernization Act (Bill C-11) has stated its objectives in backgrounders and in the preamble to the legislation, it has failed in numerous instances to draft with sufficient clarity to guide the creator and the user community.

CPC and CERC are genuinely concerned that Bill C-11 does not achieve balance but will result in significant revenue disappearing to the detriment of the cultural and business communities and for what will be only a short-term benefit to the end-user and the library and educational sectors.

In addressing the potential of digital technologies and consumer demand for the ability to maximize consumption of content through these technologies, the government has introduced an exception approach that provides individual uses of copyright material, "for free", as if there were an individual,

private right that is completely independent of the creator's right to compensation for their work. This is a completely unrealistic reflection of the marketplace, in Canada or internationally.

The articulation of a “user right” has created an expectation and sense of entitlement in the end-user community that does not correlate to the balance of public interests justification for copyright protection – **CCH must be read in its temporal and factual context**.

The government has given a little with one hand and taken away massively with the other. The net result is not a “new balance” but “new unpredictability”. As drafted, where new concepts, exceptions and uses are ill defined, it appears that clarification is only available via the courts – costly, time-consuming and limited by the facts of the case (the CCH legal process represents almost 10 years of uncertainty in the legal information business community). The rights owners are also less likely to seek redress in the courts based on alleged, non-piratical infringements because of the onerous process of initiating an action and the dramatic reduction of statutory damages available for those infringements. Furthermore, the new technologies impede identification of infringers and precise acts of infringement. **For the business community this judicial approach is no substitute for clear scope and clear consequences.**

The Canadian creative community cannot survive the loss of its effective right to make works available, to manage their distribution and reproduction and to receive compensation either directly or through internationally accepted licensing regimes such as Access Copyright. **Rights owners will only make their works available in Canada if they can be confident that their economic and moral rights will be recognized and protected.**

Our knowledge economy is ill served by suggesting that the creators, the rights holders, the publishers, the producers are the “bad guys”. It is equally ill served by encouraging the notion that copyright is a zero-sum game whereby any protections given to the creator deprive the user and are, therefore, contrary to the public interest.

A healthy creative community supports a vibrant knowledge economy. A copyright regime that undermines the creators' ability to be remunerated for their creations will poison the well.