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# Facebook Fair for Copyright of Canada: Replies to Professor Geist

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COMMENT

FACEBOOK FAIR FOR COPYRIGHT OF CANADA: REPLIES TO  
PROFESSOR GEIST<sup>♦</sup>

Barry Sookman<sup>\*</sup>

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*This article examines Professor Geist's reaction to Bill C-61 as manifested through his Facebook group "Facebook Fair for Copyright of Canada" and his blog. The author argues that Professor Geist's assessment of the Bill is unbalanced. In particular, he attempts to rebut eleven of the claims made by Professor Geist with the aim of mitigating any unwarranted adverse public opinion about the Bill that those claims may have engendered.*

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I

INTRODUCTION

This article is based on two postings made by me to the ulc\_ecomm-l list listserv moderated by John Gregory. It responds to a question posed by John Gregory on December 17, 2007 related to the usefulness of using Facebook to influence public policy. In his question, John Gregory cited a column by Michael Geist's the Toronto Star (and some other media) as to how he saw his own experience in using Facebook to oppose the current round of Canadian copyright reform through the creation of the *Facebook Fair for Copyright of Canada* initiative (the "FFCC").<sup>1</sup> I replied to his posting on January 15, 2008 and then again on February 3, 2008.<sup>2</sup> The following is the substance of my response.

The main reason I make this contribution is to comment on the unbalanced manner in which information and arguments about the Government's proposed copyright bill<sup>3</sup> (the "bill" or the "proposed bill") and its likely effects have been presented at the site by its administrator, Prof. Geist. In particular, I am concerned about the lack of objectivity and fairness of the information and arguments provided to the public through the FFCC about the need for, and

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<sup>1</sup> Michael Geist, "Facebook more than just a cool tool for kids" *The Toronto Star* (17 December 2007), online: Toronto Star <<http://www.thestar.com/Business/article/286164>>

<sup>2</sup> The February posting was a response to my first posting by Prof. Geist. Under the rules of the ulc\_ecomm-l list individuals are not permitted to quote postings made by others without their consent. Accordingly, this article does not quote from Prof. Geist's reply.

<sup>3</sup> As Parliament was dissolved before this Bill could be considered there was never an opportunity for this Bill to be passed. However, given that the Conservatives have retained minority control of the House, it is likely that a Bill will be introduced dealing with the same or similar subject matter.

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what is likely to be in, the bill, the implications of implementing the WCT and WPPT (the “WIPO Treaties”), the U.S. experience with the DMCA, and Prof. Geist’s proposals to stall WIPO implementation until other copyright issues can be addressed.

My concern is that the way in which information and arguments are presented at the site could contribute to unwarranted adverse opinions about the proposed bill and its likely effects.<sup>4</sup> I believe it is necessary to raise the bar on the public discourse related to the proposed bill. The livelihoods of many Canadians depend upon enhanced legal protection for digital works. So does the welfare of millions of Canadian consumers who would benefit from new and innovative digital services offerings. We need thoughtful and balanced debate on the important policy issues about copyright reform.

I have written elsewhere about why I believe one of the key features of the WIPO Treaties, the legal protection of technological measures (TPMs), will benefit all copyright stakeholders including users and creators by fostering a legal infrastructure that will create incentives to produce and disseminate works over digital networks.<sup>5</sup> I will not repeat these arguments here. The main focus of this contribution is to examine the information provided and linked to by Prof. Geist at the site to highlight the way in which any proposed bill and its likely consequences are being depicted.<sup>6</sup>

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<sup>4</sup>I leave it to others to assess whether the FFCC is subject to the journalistic ethical principles of objectivity, fairness, and transparency and, if so, whether those principles have been met in this case. See the following regarding the principles of good journalism: “A Bloggers’ Code of Ethics” Cyberjournalist.net (15 April 2003) online: Cyberjournalist.net <<http://www.cyberjournalist.net/news/000215.php>>; Bob Steele, “Guiding Principles for the Journalist” *Poynter Online* online: Poynter Online <<http://www.poynter.org/column.asp?id=36&aid=4349>>; Sue Careless, “Advocacy Journalism” *The Interim* (May 2000), online: The Interim <<http://www.theinterim.com/2000/may/10advocacy.html>>

<sup>5</sup> See Barry B. Sookman, “Technological Measures: A Perfect Storm for Consumers: Replies to Prof. Geist” (2005) 4 *Canadian Journal of Law and Technology* 1 [“Sookman Replies to Prof. Geist”].

<sup>6</sup> For transparency purposes I disclose that my firm has represented CRIA and other rights holders in copyright matters. It also has represented leading users of copyright content in significant copyright matters. However, the views expressed here are my own personal views and do not necessarily reflect those of my firm or any of its clients.

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## II

### THE SITE DESCRIPTION

The site description (“Site Description”) is written by Prof. Geist, the sole administrator of the site. He describes the objectives of the “fair” copyright group as follows:

“The Canadian government is about to introduce new copyright legislation that will be a complete sell-out to U.S. government and lobbyist demands. The new Canadian legislation will likely mirror the U.S. Digital Millennium Copyright Act with strong anti-circumvention legislation that goes far beyond what is needed to comply with the World Intellectual Property Organization's Internet treaties. Moreover, it will not address the issues that concern millions of Canadians. For example, the Conservatives' promise to eliminate the private copying levy will likely be abandoned. There will be no flexible fair dealing. No parody exception. No time shifting exception. No device shifting exception. No expanded backup provision. Nothing that focuses on the issues of the ordinary Canadian.

Instead, the government will choose locks over learning, property over privacy, enforcement over education, (law) suits over security, lobbyists over librarians, and U.S. policy over a "Canadian-made" solution.

This group will help ensure that the government hears from concerned Canadians. It will feature news about the bill, tips on making the public voice heard, and updates on local events. With regular postings and links to other content, it will also provide a central spot for people to learn more about Canadian copyright reform.”

Needless to say, it is not surprising if your average Facebook user would oppose a bill that is a “complete sell-out to U.S. government and lobbyist demands”, with “nothing that focuses on the issues of the ordinary Canadian”, and which “choose[s] locks over learning, property over privacy, enforcement over education, (law) suits over security, lobbyists over librarians, and U.S. policy over a ‘Canadian-made’ solution.” The average Facebook user seeking to dig further for a fair and balanced discussion of the issues that has compelled the

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Government to announce that it will introduce copyright reform legislation won't find it on the Fair Copyright Facebook group, however.

Just below the Site Description are links to sites that contain "Web-Based Resources on Canadian Copyright". The first link is to articles written by Prof. Geist located at <http://www.michaelgeist.ca>.<sup>7</sup> Other recommended web based resources are links to CIPPIC's site, <http://www.cippic.ca>, Digital-Copyright.ca: <http://www.digital-copyright.ca> moderated by Russell McOrmond, and Howard Knopf's site, *Excess Copyright*, located at <http://excesscopyright.blogspot.com/> ("Knopf Site"). As the name of the Knopf Site indicates, the information at these sites is largely "anti-copyright" in orientation and critical of what is perceived to be (or not to be) in the bill. None of the recommended links are to "pro-copyright" sites or even sites that exhibit a balance of content or encourage a dialectic. The referenced sites also contain many interlinking references back to Prof. Geist's own site or to articles written by him, thus re-enforcing his own personal views about copyright reform issues. FFCC readers who take the time to read only the resources provided or linked to at the site would undoubtedly come away with the one-sided views expressed by the authors of the linked-to materials.

Here are some of the examples of information and arguments at the site that are of concern to me.

### III

#### PROF. GEIST ASSERTION: THE BILL WILL BE A CANADIAN DMCA

Prof. Geist professes to know what is in the proposed bill and that it will be modeled after the US DMCA. For example, his blog entry of Wednesday October 24, 2007, states that "the bill will include DMCA-style provisions...ISPs will get their safe harbour, and the government may try to curry favour with the provinces with an

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<sup>7</sup> Most references to writings of Prof. Geist here are taken from articles or blogs published and linked to the FFCC by him as of December 23, 2007.

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Internet exception for education.”<sup>8</sup> His November 27, 2007, blog entry states that:

The new Canadian legislation will likely mirror the DMCA with strong anti-circumvention legislation -- far beyond what is needed to comply with the WIPO Internet treaties - - and address none of the issues that concern millions of Canadians. The Conservatives promise to eliminate the private copying levy *will* likely be abandoned. There *will* be no flexible fair dealing. No parody exception. No time shifting exception. No device shifting exception. No expanded backup provision. Nothing.

The government *will* seemingly choose locks over learning, property over privacy, enforcement over education, (law)suits over security, lobbyists over librarians, and U.S. policy over a "Canadian-made" solution. *Once the bill is introduced, look for the government to put it on the fast track with limited opportunity for Canadians to appear before committees considering the bill.* With a Canadian DMCA imminent, what matters now are voices. It will be up to those opposed to this law to make theirs heard. (emphasis added)

Prof. Geist's purported knowledge of the contents of the proposed bill is troubling. The proposed bill has not been released publicly. Further, the government has not made any announcements about how key provisions that implement the WIPO Treaties will be drafted. So, how does Prof. Geist know what the bill will contain and that it will be modeled after the DMCA or be more stringent than required to implement the WIPO Treaties? Also, why would he have received advance information about the contents of the bill given his well known opposition to a "DMCA-style" bill? If Prof. Geist does not have actual knowledge of what is in the bill and is merely speculating about such matters, then why doesn't he state this clearly on the FFCC and in his writings? If he is merely speculating, the public

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<sup>8</sup> Michael Geist, "Details Beging To Emerge on Forthcoming Copyright Bill" (24 October 2007), online: Michael Geist Blog <<http://www.michaelgeist.ca/content/view/2321/125/>>.

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should have been told by Prof. Geist that he was playing with a Ouija board and that he actually knows little about what the bill contains.<sup>9</sup>

Further, Prof. Geist's dubbing the proposed bill as the "CDMCA" and his statements that this type of legislation is to be feared is also troubling for a number of reasons.

First, this nomenclature is simply designed to leverage anti-American sentiments and to shift the debate away from the real policy questions faced by Canadians.

Second, Prof. Geist makes incorrect and exaggerated claims about the DMCA. By way of example only he claims that legislation based on the DMCA:

- Will have "a devastating effect on small business, which will face barriers to innovation".<sup>10</sup> Yet Prof. Geist knows that the DMCA has been authoritatively construed to ensure this does not happen.<sup>11</sup>
- Will "largely eliminate fair dealing in the digital world." This statement has little basis in fact, is misleading and grossly exaggerates the legal impact of legal protection for TPMs under the DMCA.<sup>12</sup>
- Could make "everyday habits illegal". This statement is perhaps good rhetoric but is entirely inaccurate.<sup>13</sup>

Prof. Geist's references to the "DMCA" are intended to conjure up impressions that the DMCA is actually bad legislation that does not serve the public interest. Despite the rhetoric, the negative claims about the DMCA made by Prof. Geist simply are not borne out. (See Sections 9-11 below where the claims he makes are examined.)

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<sup>9</sup> It is also possible that Prof. Geist knows that Canada really does not have the flexibility he claims to develop a "made in Canada solution". (See Section 3 below) In this case, it would be correct to predict that the bill would contain provisions mandated by the WIPO Treaties and be similar to those in the DMCA and in the legislation of all of Canada's leading trading partners and the vast majority of the developed countries around the world.

<sup>10</sup> Michael Geist, "Ten Questions for Industry Minister Prentice" (10 December 2007), online: Michael Geist Blog < <http://www.michaelgeist.ca/content/view/2454/159/> > December 10, 2007. The reference is to the Skylink case.

<sup>11</sup> *Chamberlain Group, Inc. v Skylink Technologies, Inc.* 381 F.3d 1178 (Fed.Cir. 2004), *Lexmark Int'l Inc. v Static Control Components Inc.* 387 F.3d 522 (6<sup>th</sup> Cir. 2004).

<sup>12</sup> See Section 9 below.

<sup>13</sup> *Ibid.*



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Although there are some detractors, the DMCA is widely recognized as good legislation that has served the US public well. In fact, the DMCA has been used as a model for legislation in at least 12 countries that have implemented the WIPO Treaties, including Australia and Singapore.

Third, the DMCA is designed to implement the WIPO Treaties. Accordingly, in relation to legal protection for TPMs, for example, its provisions reflect the requirements that any implementing legislation must contain, including “adequate legal protection” and “effective legal remedies” to prevent the circumvention of TPMs. Because of these treaty requirements, very similar provisions to the TPM provisions in the DMCA have been enacted by all of our major trading partners, including members of the EU and Australia.

Fourth, the trend internationally among Canada’s trading partners is to provide strong measures to protect against online piracy, not weak (or anorexic) protection as advocated by Prof. Geist. For example, Articles 8(1) and 8(2) of the EU Copyright Directive require effective remedies against those that facilitate online infringements. Accordingly, the copyright laws of Member States of the EU provide remedies against those individuals or entities which knowingly facilitate infringement.

In France, for instance, it is a crime for anyone to knowingly publish, distribute or promote software manifestly aimed at the unauthorised making available of protected content or to knowingly incite, including through advertising, the use of such a software product.<sup>14</sup> Further, in addition to fully implementing the WIPO Treaties, France has recently also undertaken a strong anti-piracy agenda with President Sarkozy’s appointment of the *Olivennes Commission*. Far from acquiescing to online piracy, the French Government has warned that “we need to act against the theft of creative works before it is too late”.<sup>15</sup>

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<sup>14</sup> *Loi n° 2006-961 du 1 août 2006*, J.O. 3 August 2006, art. L335-2-1. Australia has also amended its copyright law to strengthen its authorization right to provide rights holders with more effective tools to pursue those whose software or services contribute to massive online infringements. See S101 of the Australian *Copyright Act*.

<sup>15</sup> Statement of Ms. Albanel (Minister of Culture) also noting that a billion music and movie files were illegally shared in France in 2006.

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Similarly, the UK government has indicated that it may enact new laws designed to stamp out illegal file-sharing in the UK.<sup>16</sup> In this regard, Lord Triesman, recently stated that "We're not prepared to see the kinds of damage that will be done to the creative economy" by failure to adopt measures to protect rights holders against unauthorized online copying.<sup>17</sup> Further, the EU, even after implementing the WIPO Treaties (see below), is now considering further legislation designed to protect digital copyrights.<sup>18</sup>

#### IV

##### PROF. GEIST ASSERTION: CANADA HAS THE FLEXIBILITY TO IMPLEMENT THE WIPO TREATIES WITH NO EFFECTIVE PROTECTION FOR TPMS

Prof. Geist informs his readers that Canada has the flexibility to develop a "made in Canada solution" in implementing the WIPO Treaties. According to Prof. Geist, there is great flexibility on how a country chooses to implement those treaties.<sup>19</sup>

No one disagrees that Canada has some scope as to how the treaties can be implemented. The real questions, however, are: (a) whether the proposals he makes for implementation would actually enable Canada to comply with the letter and spirit of the treaties, and (b) whether his proposals are really intended to, or would actually, do anything to create or foster a better legal environment which would encourage the production and distribution of culture in this country.

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<sup>16</sup> Matt Chapman, "UK government plans file-sharing laws" *VNU.net* (25 October 2007), online: <http://www.vnunet.com/vnunet/news/2202030/uk-government-plans-file>.

<sup>17</sup> See Chris Williams, "Government piles filesharing pressure on UK ISPs" *The Register* (8 January 2008), online: The Register <[http://www.theregister.co.uk/2008/01/08/triesman\\_isps\\_legislation\\_timetable/](http://www.theregister.co.uk/2008/01/08/triesman_isps_legislation_timetable/)>; Owen Gibson, "Copying music legally in the digital age" *The Guardian* (9 January 2008), online: Guardian News and Media Limited <<http://www.guardian.co.uk/technology/2008/jan/09/copyrightlaws>>.

<sup>18</sup> William New, "EU Online Copyright Bill Coming; Publishers Debate DRMs" *Intellectual Property Watch* (9 December 2007), online: Intellectual Property Watch <<http://www.ip-watch.org/weblog/index.php?p=861>>

<sup>19</sup> See Michael Geist, "The Canadian DMCA 's Talking Points" *Michael Geist Blog* (10 December 2007), online: Michael Geist Blog <<http://www.michaelgeist.ca/content/view/2458/125/>>

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In my view Prof. Geist's proposals are not intended to comply with the letter and spirit of the treaties or to do anything to actually help rights holders. Let me give several examples.

First, Prof. Geist argues that the "anti-circumvention provisions should be directly linked to copyright infringement." He says "It should only be a violation of the law to circumvent a technological protection measure (TPM) if the underlying purpose is to infringe copyright."<sup>20</sup> Such a restriction does not meet the objectives of the WIPO Treaties or help stem the problems associated with circumvention of TPMs used to support new and innovative business models.

Under the WIPO Treaties, Contracting Parties are required to protect against circumvention of those technological measures that control unauthorized acts.<sup>21</sup> The technological measures that must be protected include all those "that restrict acts in respect of" works and other subject matter, without any additional requirement that there be any act of direct infringement or that the act be done for the purpose of infringement. Prof. Geist's proposed restriction of the required protection to circumvention done for an infringing purpose adds a material limitation not found in the WIPO Treaties, significantly limiting its usefulness in combating the circumvention of technological measures.

It should not be necessary to prove that a prohibited act of circumvention is undertaken for the purpose of committing infringement. If WIPO had intended such a limitation, it would have been specifically provided for in Article 11 of the WCT and Article 18 of the WPPT, as it was with respect to Article 12 of the WCT and Article 19 of the WPPT, which prescribe obligations concerning rights management information.<sup>22</sup> The drafters of the WIPO Treaties

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<sup>20</sup> Michael Geist, "My Fair Copyright for Canada Principles" (17 January 2008), online: Michael Geist Blog <<http://www.michaelgeist.ca/content/view/2572/125>>

<sup>21</sup> Jörg Reinbothe & Silke von Lewinski, *The WIPO treaties 1996 : the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty : commentary and legal analysis*. (London: Butterworths, 2002) at 146 [Reinbothe & von Lewinski,].

<sup>22</sup> Both the WCT and WPPT qualify the obligations concerning rights management information with knowledge qualifiers. Article 12 WCT states "Contracting Parties shall provide adequate and effective legal remedies against any person knowingly performing any of the following acts knowing, or with respect to civil remedies, having reasonable grounds to know, that it will induce, enable, facilitate or conceal

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did not do so, because requiring evidence of copyright infringement or infringing intent would seriously undermine the obligations concerning technological measures and would undermine the objective of ensuring that anti-circumvention provisions provide “adequate legal protection” and “effective legal remedies” against circumvention of TPMs.

Most circumvention of technological measures will take place in private. Accordingly, there will be significant difficulties in establishing the purpose of the alleged circumventor. A rightsholder will not know, for example, whether the circumvention is for the purpose of one of the exemptions or limitations in the Act such as a fair dealing or for the purpose of making copies. If the rightsholder can establish an act of infringement, the act would already result in a cause of action for unauthorized infringement. In practical terms, therefore, his proposal would provide little or no protection for rightsholders.

The requirement that a rightsholder prove that a technological measure has been circumvented for the purpose of infringement is at odds with, and creates a standard that does not conform with, the internationally generally accepted methods used by other jurisdictions to protect against the circumvention of TPMs. These jurisdictions provide remedies against the circumvention of effective technological measures that are used by authors “in connection with the exercise of their rights” “and that restrict acts” “which are not authorized by the authors concerned or permitted by law”. They do not require a showing that the circumvention was for the purpose of infringement.

The EU Copyright Directive requires Member States to provide adequate legal protection against the circumvention of any “effective technological measure”.<sup>23</sup> The term “effective technological measure” is defined to include any technology, tool or component that in the normal course of its operation “is designed to prevent or restrict acts, in respect of works or other or other subject matter, which are not authorized by the right holder”.<sup>24</sup> There is no additional

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an infringement of any right covered by this treaty or the Berne Convention”. Article 19 of WPPT is to the same effect.

<sup>23</sup> Article 6(1) of the EU Copyright Directive.

<sup>24</sup> Article 6(3) of the EU Copyright Directive.

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requirement to establish that the circumventor acted for the purposes of infringing copyright.

Further, it is also essential also to extend protection against trafficking in access control and copy control TPMs, without a need to show that the use has been for an infringing purpose.

The anti-circumvention provisions of the WIPO Treaties do not expressly state whether they apply only to circumvention conduct or also to tools that are designed or distributed to circumvent technological measures. A conduct only approach has, however, been uniformly rejected in the international community as a means of satisfying the WIPO Treaties requirements for adequate legal protection and effective legal remedies against the circumvention of technological measures.<sup>25</sup>

There are substantial policy reasons for not adopting a conduct only approach. The results of circumvention activity may be public, but the activity leading up to the circumvention of the technological measure is usually done in private. It is far preferable not to have to monitor private conduct to deter circumvention activity. The less intrusive and more effective legal remedy is to target the manufacture and distribution of circumvention tools. However, the absence of protection against the manufacture and distribution of tools would require monitoring of private conduct of individuals in order to stem acts of circumvention. It would also force copyright holders to sue multiple individuals for their activities instead of the most prejudicial perpetrator – the entity trafficking in circumvention tools.

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<sup>25</sup> *WIPO Guide to the Copyright and Related Rights Treaties Administered by WIPO* (2003), at para CT-11.16 [WIPO Guide]; Mihaly Ficsor, *The Law of Copyright and the Internet* (London: Oxford University Press, 2002) 549 [Ficsor]; *Reinbothe & von Lewinski, supra* note 21 at 141; Dean Marks, “Promoting Innovation and Economic Growth: The Special Problem of Intellectual Property” (Delivered at 6 Digital Connections Council of the Committee for Economic Development, Washington, DC, United States, 2004) [unpublished]; Michael Schlesinger, “Implementation of the WIPO Treaties Beyond the U.S. and the EU” (Presented at the Eleventh Annual Conference on International Intellectual Property Law & Policy, April 23, 2003, Fordham University School of Law) (“Schlesinger”) [unpublished]; Strowel, A. et al, “Legal Protection of Technological Systems” (Presented at WIPO Workshop in Implementation Issues of the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) Geneva, December 6 and 7, 1999) [unpublished].

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It is also clear that the greatest prejudice to rightsholders is the easy and wide availability of circumvention tools. Rightsholders lack adequate legal protection against circumvention unless they have the means to prevent the dissemination of tools that facilitate infringement. In fact, the vast majority of legal proceedings brought in other jurisdictions shows that the most effective means to address circumvention related piracy is to target the manufacture and distribution of circumvention tools. If people can legally acquire tools that defeat technological measures, then it becomes difficult if not impossible to maintain the integrity and fulfil the purpose of protection measures.<sup>26</sup>

The authoritative texts which have interpreted the obligations imposed by the WIPO Treaties agree that to be adequate and effective, anti-circumvention provisions must prohibit the trafficking in circumvention tools and the provision of services which can be used for circumvention purposes. The WIPO Guide states the following in this regard:<sup>27</sup>

For these reasons, Contracting Parties may only be sure that they are able to fulfil their obligations under Article 11 of the Treaty if they provide the required protection and remedies: (i) against both unauthorized acts of circumvention, and the so-called “preparatory activities” rendering such acts possible (that is, against the manufacture, importation and distribution of circumvention tools and the offering of services for circumvention)... (iii) not only against those devices whose only – sole – purpose is circumvention, but also against those which are primarily designed and produced for such purposes, which only have a limited, commercially significant objective or use other than circumvention, or about which it is obvious that they are meant for circumvention since they are marketed (advertised, etc.) as such ....

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<sup>26</sup> Strowel, *supra* note 25; Dean Marks *supra* note 25.

<sup>27</sup> WIPO Guide, *supra* note 25 at para CT-11.16.

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Ficsor, *The Law of Copyright and the Internet* makes the same point:<sup>28</sup>

It should be taken into account that, in general, the acts of circumvention of technical protection measures will be carried out by individuals in private homes or offices, where enforcement will be very much more difficult, *inter alia*, because of objections thrown up by some privacy considerations. Thus, if legislation tries only to cover the acts of circumvention themselves, it cannot provide adequate legal protection and effective legal remedies against such acts which, in spite of the treaty obligations, would continue uncontrolled.

Reinbothe and von Lewinski, in their book *The WIPO Treaties*, are equally unequivocal about the need to include protection against trafficking of circumvention tools and the provision of services which are made available for the purpose of circumventing technological measures:<sup>29</sup>

Three issues are crucial and have to be taken account of in the context of any provision on the protection of technological measures. The first one concerns the question as to whether protection of technological measures may be limited to protection against the acts of circumvention, or whether such protection would only be meaningful if it also extended to protection against devices and services which form the basis for circumvention. It may be held that legal protection against circumvention is only meaningful and adequate if it also covers circumvention devices and services, the so-called 'preparatory acts'.

Consequently, though Article 11 WCT explicitly requires protection and remedies 'against circumvention' only, it must be assessed whether the prohibition should extend to both devices and conduct.

By its nature, Article 11 WCT provides for minimum protection, which Contracting Parties are free to go beyond in their domestic law. The question arises, whether this minimum protection only covers acts of circumvention. It seems that limiting the protection to such acts would not correspond to the objective of the provision. Acts of

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<sup>28</sup> Ficsor, *supra* note 25 at 549.

<sup>29</sup> Reinbothe & von Lewinski, *supra* note 21 at 141, 144-145.

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circumvention of the technological measures may be committed by individuals in their homes. As these activities are not easily controllable, protection can hardly be enforced in an effective manner if it focuses exclusively on the act of circumvention. Moreover, the manufacturing and distribution of devices which permit or facilitate circumvention may potentially cause more important prejudice to rightholders than acts of circumvention. A 'circumvention only' approach appears, therefore, to be insufficient.

Accordingly, the obligation to provide for 'adequate protection' under Article 11 WCT would seem to require that rightholders enjoy protection also against preparatory acts on top of protection against the acts of circumvention themselves. The domestic law of Contracting Parties would have to proscribe devices, products, components or the provision of services which are produced or distributed for the purpose of circumventing protection technologies.

Jane Ginsburg comes to the same conclusion in rejecting the proposition that the WCT does not require protection against trafficking in circumvention tools:<sup>30</sup>

Such an inference seems unwarranted, because it would significantly diminish the effectiveness of the prohibition. First, limiting the prohibition to the act of circumvention would mean that copyright owners would need to discover and prove the commission of acts that may often occur in private, at the user's home. This seems both difficult for copyright owners and undesirable to users. Second, outlawing the device as well as the activity is likely to have a greater impact on the provision of circumvention devices; without the device, less circumvention is likely to occur, and it is more effective to pursue a small number of device suppliers than the large numbers of their customers. Moreover, the formulation "the circumvention" should be read in the context of the sentence in which it appears. An interpretation that disfavors effective protection against circumvention by limiting the prohibited conduct to the

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<sup>30</sup> Jane C. Ginsburg, "Legal Protection of Technological Measures Protecting Works of Authorship: International Obligations and the U.S. Experience", Columbia Public Law & Legal Theory Working Papers, Paper 0593, 2005, online:<<http://lsr.nellco.org/columbia/pllt/papers/0593>> at 8.



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sole act of circumvention, rather than encompassing the provision of devices as well, would be inconsistent with art. 11's direction that member States "shall provide adequate legal protection and effective legal remedies against the circumvention".

In recognition of the need to provide rights and remedies against circumvention tools, the international norm of countries that have implemented the WIPO Treaties is to prohibit trafficking in circumvention tools. Countries and territories that have done so include the United States, Australia and Japan.<sup>31</sup> These obligations are also contained in the European Copyright Directive and have been implemented by its member states.

Second, Prof. Geist argues that the making available right should "require actual distribution, which ensures that liability only flows from real harm."<sup>32</sup> This proposal flies in the face of Article 8 of the WCT which specifically requires that authors of works "shall enjoy the exclusive right of...making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them." Articles 10 and 14 of the WPPT contain similar provisions.

The "making available" right in the WIPO Treaties was drafted in a neutral way to permit this right to be implemented in one of three ways: (1) making it part of the communication to the public right; (2) making it part of a distribution right; or (3) enacting a separate standing "making available" right. This "umbrella solution" left implementing nations the choice as how best to implement the right within its own copyright framework.<sup>33</sup>

The "making available" right was intended to obviate any need to prove an actual download or communication. The right is intended to cover "the mere establishment of a server which may be accessed individually by members of the public".<sup>34</sup> If a work is actually transmitted to a member of the public, there would be both a reproduction and a communication of the work anyway. The

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<sup>31</sup> Covered through a combination of Japan's copyright law and unfair competition laws.

<sup>32</sup> Geist, *supra* note 20.

<sup>33</sup> Ficsor, *supra* note 25 at 496-498; *Guide to the Copyright and Related Rights Treaties Administered by WIPO* (Geneva, 2003) at CT-8-4-8-10.

<sup>34</sup> Reinbothe & von Lewinski, *supra* note 21 at 108.

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problem in online enforcement of rights without a “making available right” is the ability to establish that individuals have downloaded works from a public site or over a file sharing service. This proof requires rights holders to monitor the activities of users and to collect information to enable them to make their case against the greater perpetrators of harm.

The United States complies with its obligations under the WIPO Treaties with a combination of the right of distribution (along with the underlying right of reproduction) and the right of public performance (corresponding to the right of communication to the public).<sup>35</sup> In that country, the term "distribute" is not defined. However, the right of distribution is synonymous with the right of publication, which includes "[t]he offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display."<sup>36</sup> This right has been successfully used against persons who have made available files to download from bulletin board systems, websites, and over peer-to-peer networks. It has been successfully used precisely because the courts have not required proof of successful downloading to establish infringement.<sup>37</sup>

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<sup>35</sup> Ficsor, *supra* note 25 at 502-504.

<sup>36</sup> 17 U.S.C. § 101.

<sup>37</sup> See, e.g., *A & M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001) (“Napster users who upload file names to the search index for others to copy violate plaintiffs’ distribution rights.”); *Interscope Records v. Duty* 79 U.S.P.Q.2d 1043 (D.Ariz.2006) (“the mere presence of copyrighted sound recordings in [defendant’s] share file may constitute copyright infringement.”); *State v. Perry*, 57 U.S.P.Q.2d 1125 (Ohio 1998) (“[p]osting software on a bulletin board where others can access and download it is distribution,” i.e., publication); *Getaped.com Inc. v. Cangemi*, 62 U.S.P.Q.2d 1030 (S.D.N.Y. 2002) (when a webpage goes live on the Internet, it is distributed and ‘published’ in the same way as music files). See also the following cases applying the publication right *United States v. Abraham*, 2006 U.S. Dist. LEXIS 81006 (W.D.Pa. Oct. 24, 2006) (“the defendant *distributed* a visual depiction when as a result of the defendant's installation of an Internet peer-to-peer video file sharing program on his computer, a Pennsylvania state trooper was able to download the child pornography from the defendant's computer to the trooper's computer.”); *United States v. Mathenia*, 409 F.3d 1289 (11<sup>th</sup> Cir. 2005) (upholding 15-level sentencing enhancement for, *inter alia*, distributing child pornography through peer-to-peer file-sharing groups); *State v. Perry*, 83 Ohio St. 3d 41, (1998) (“Posting software on a bulletin board where others can access and download it is distribution.”); *United States v. Todd*, 100 Fed. Appx. 248, 250 (5<sup>th</sup> Cir. 2004) (unpub.)

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Prof. Geist's solution would do nothing to assist online enforcement of rights against pirates. It would not comply with the WIPO Treaty requirements. Also, it would subject individuals to the collection of online information (such as IP addresses) that would be unnecessary if rights holders are given a clear right to go after the real perpetrators of infringing conduct.

V

PROF. GEIST ASSERTION: THE WIPO TREATIES HAVE NOT BEEN  
WIDELY ADOPTED

Prof. Geist asserts that "Canada has signed but not ratified the WIPO Internet Treaties" and that we "are not alone in that regard as the European countries have not formally ratified the treaties" either. He also says that "the majority of the world's countries have not even signed the treaties, much less ratified them."<sup>38</sup> His blog entry links to a blog at the Knopf Site to support his views.<sup>39</sup> The Knopf Site contains another blog posting that asserts that the WIPO Treaties "have had an embarrassingly slow uptake in terms of ratification. Amongst developed countries, only the USA, Japan and Australia (courtesy of now de-elected John Howard) have ratified."<sup>40</sup> These postings present a false impression of where Canada stands in relation to the rest of the world, and to its major trading partners, in adopting the WIPO Treaties.

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(user of file-share software who downloaded child pornography images and "ma[de] them accessible to others" through file sharing met the definition of "trafficking").

<sup>38</sup> Michael Geist, "Signing vs. Ratifying" (8 March 2007), online: Michael Geist Blog <<http://www.michaelgeist.ca/content/view/1790/125/>>. See also, Michael Geist, "A Little More Light" (23 October 2006) online: Michael Geist Blog <<http://www.michaelgeist.ca/content/view/1494/125/>> ("the notion that rejecting WIPO will place Canada in isolation from almost the entire developed world is simply untrue as the majority of our leading trading partners have yet to ratify the WIPO Internet Treaties").

<sup>39</sup> Howard Knopf, "Canadian Copyright, Kyoto, Cacaphony, Conflation and Confusion" (7 March 2007), online: Excess Copyright <http://excesscopyright.blogspot.com/2007/03/canadian-copyright-kyoto-cacaphony.html>.

<sup>40</sup> Howard Knopf, "A Public Domain Project For WIPO" (15 December 2007), online: Excess Copyright <http://excesscopyright.blogspot.com/2007/12/public-domain-project-for-wipo.html>.

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In fact, more than 60 countries have already ratified each of the treaties, including such countries as China, Australia, Singapore, Hungary, Mexico, Japan, South Korea, and the U.S.<sup>41</sup> More significantly, the Knopf Site misleads in focusing on “ratification” but failing to acknowledge that the vast majority of the developed world - including all of Canada’s leading trading partners -- have *implemented* (i.e. adopted into law the requirements of) the WIPO Treaties. For example, the European Union has adopted the EU *Copyright Directive*, which has the force of law in each EU country, implementing the WIPO Treaties. Moreover, every EU member state (including such major Canadian trading partners as France, Germany, the U.K., Italy, Spain, Greece, Sweden, Finland, Denmark, Austria, the Netherlands, Portugal, and Ireland) has implemented the provisions of the Treaties, and the EU and its member states are poised to ratify the WIPO Treaties simultaneously once each of the member states have completed their internal domestic and constitutional formalities necessary for ratification.<sup>42</sup>

## VI

### PROF. GEIST ASSERTION: THE BILL IS A SELL-OUT TO U.S. GOVERNMENT AND LOBBYIST DEMANDS

Prof. Geist alleges that the proposed bill is a “complete sell-out to U.S. government and lobbyist demands”.<sup>43</sup> Readers of Prof. Geist’s statements are given the false impression that this is a “U.S.” policy, and not one that has been adopted and accepted worldwide or demanded by mainstream Canadians. However, as detailed above, *all* of Canada’s leading trading partners have implemented the WIPO Treaties.

Further, there is widespread support in Canada for a bill that fully implements the WIPO Treaties. For example, there is broad support for WIPO implementation from representatives of all the

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<sup>41</sup> See WIPO Notification page, [http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&search\\_what=N&treaty\\_id=16](http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&search_what=N&treaty_id=16)

<sup>42</sup> See Council Of The European Union, Brussels, 12 July 2007, 11517/07 PI 34 CULT 37 Re: Agreed principles with regard to the ratification of the 1996 WIPO Treaties.

<sup>43</sup> See Site Description

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cultural industries that depend on copyright, including the CFTPA and ACTRA (motion pictures producers and actors), CMPDA (motion pictures), ESA (entertainment software), BSA (software), and CPC (publishers). There is also widespread support among stakeholders in the music industries including by the American Federation of Musicians of United States and Canada (AFM Canada), Canadian Independent Record Production Association (CIRPA), Canadian Music Publishers Association (CMPA), Canadian Recording Industry Association (CRIA), Music Industries Association of Canada (MIAC), Music Managers Forum Canada (MMF), Retail Music Association of Canada (RMAC), and the musicians Union for Canada (AFMC). There is also broad support for WIPO ratification from Canadian businesses including the Canadian Chamber of Commerce and the Ontario Chamber of Commerce both of which recently expressly recognized the direct relationship between protection of copyrights and the growth of investment, jobs, and innovation in the cultural industries.<sup>44</sup>

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<sup>44</sup> See Canadian Chamber of Commerce, “Greater Protection of Intellectual Property Required in Canada” September 18, 2007, Ontario Chamber of Commerce “Protection of Intellectual Property: A Case for Ontario” 2007-2008. The copyright industries make major contributions to the Canadian economy. See, Industry Canada & Canadian Heritage, *Framework for Copyright Reform* (Ottawa: Industry Canada, 2001) online: Industry Canada <http://strategis.ic.gc.ca/epic/Internet/incrp-prda.nsf/en/rp01101e.html>, Canadian Heritage, *The Economic Contribution of Copyright Industries to the Canadian Economy* by Wall Communications Inc. (Ottawa: Canadian Heritage, 2004) online: Canadian Heritage <http://www.pch.gc.ca/progs/ac-ca/progs/pda-cpb/pubs/Index>. See also, “Taking Forward The Gowers Review of Intellectual Property: Proposed Changes to Copyright Exceptions”, UK Intellectual Property Office, November, 2007 (“The creative industries are...currently estimated to account for 7.3% of the UK economy. It is therefore essential that we maintain a strong system of copyright to ensure the continued growth of this and other important sectors...A system of strong rights, accompanied by limited exceptions, will provide a framework that is valued by and protects right holders and is both understood and respected by users.”)

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## VII

### PROF. GEIST ASSERTION: CANADIANS WERE NOT CONSULTED ABOUT COPYRIGHT REFORM

Prof. Geist argues that there has been inadequate consultation about how to implement the WIPO Treaties. Accordingly, he calls for further study before the bill is introduced.<sup>45</sup>

In fact, since 2001, there has been extensive consultation and debate in Canada on issues related to WIPO implementation including the policy issues associated with protection for TPMs:

- Extensive, nationwide consultations were held throughout 2001.<sup>46</sup>
- The Government of the day publicly discussed its policy options in 2002.<sup>47</sup>
- The policy options were discussed in detail in the Section 92 Report released in 2002,<sup>48</sup> and the Government of the day invited and received substantial number of submissions on the policy options.
- The policy options were again discussed and public hearings held in 2004 prior to the release of Bill C-60.<sup>49</sup>
- The Government of the day after further consultations released another report with policy recommendations.<sup>50</sup>

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<sup>45</sup> See Geist blog entries December 10 and 20, 2007.

<sup>46</sup> See “A Framework for Copyright Reform”, (June 2001), online:

<<http://strategis.ic.gc.ca/epic/Internet/incrp-prda.nsf/en/rp01101e.html>>; Canada, Industry Canada Intellectual Property Policy Directorate, Copyright Policy Branch, Canadian Heritage, *Consultation Paper on Digital Copyright Issues*, (22 June 2001), online: <[http://strategis.ic.gc.ca/epic/Internet/incrp-prda.nsf/en/h\\_rp01102e.html](http://strategis.ic.gc.ca/epic/Internet/incrp-prda.nsf/en/h_rp01102e.html)>.

<sup>47</sup> Canada, Industry Canada, Canadian Heritage, *An Overview of Submissions on the Consultation Paper on Digital Copyright Issues*, (Prepared for March – April 2002 Consultation Meetings on Digital Copyright Issues), online: <<http://strategis.ic.gc.ca/SSI/rp/summary.pdf>>.

<sup>48</sup> Canada, Industry Canada, *Supporting Culture and Innovation: Report on the Provisions and Operation of the Copyright Act* (Section 92 Report, October 2002).

<sup>49</sup> Minister of Canadian Heritage and the Minister of Industry, *Status Report on Copyright Reform*, (Submitted to the Standing Committee on Canadian Heritage, 24 March 2004), online: <<http://strategis.ic.gc.ca/epic/Internet/incrp-prda.nsf/en/rp01133e.html>>.

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- Recently, in June 2007, following public hearings on piracy and counterfeiting, the *Standing Committee on Industry, Science and Technology* called for swift enactment of legislation to implement the WIPO Treaties.<sup>51</sup>
  - The Canadian Government has continually consulted on copyright reform issues related to the WIPO Treaties. For example, Prof. Geist participated only this November in an Industry Canada Roundtable on Copyright reform at which protection for TPMs was discussed at length by Prof. Geist.
  - Prof. Geist has also written extensively on copyright reform, including in his regular columns in the *Toronto Star* and *Ottawa Citizen* and in his blogs (including his “30 days of DRM” blogs). So his policy views and those of his followers are well known.

Moreover, the U.S. has studied the impacts of the DMCA. Overall it has found the effects to be positive and has rejected claims such as those made by Prof. Geist that the DMCA has had deleterious effects.<sup>52</sup> (Also, see below).

The short of it is that Canada has been studying implementing the WIPO Treaties since at least 1997 when it signed the treaties after participating actively in their negotiations. The suggestion that divergent views about these treaties have not been fully considered by the Canadian Government is simply wrong.

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<sup>50</sup> Report of the Standing Committee on Canadian Heritage, *Interim Report on Copyright Reform*, (May 2004), online: [www.parl.gc.ca/InfocomDoc/Documents/37/3/parlbus/commbus/house/reports/herirp01-e.htm](http://www.parl.gc.ca/InfocomDoc/Documents/37/3/parlbus/commbus/house/reports/herirp01-e.htm)

<sup>51</sup> *Counterfeiting and Piracy Are Theft: Report of the Industry Standing Committee on Industry, Science and Technology*, (June 2007); *Counterfeit Goods in Canada – A Threat to Public Safety* (Report to the Standing Committee on Public Safety and National Security, May 2007).

<sup>52</sup> See, e.g., June Besek, “Anti-Circumvention Laws and Copyright: A Report From the Kernochan Center for Law, Media and the Arts” (2004) 27 Colum. J. L. & the Arts 389 at 446-66; Copyright Office, *Exemption to Prohibition on Circumvention of Copyright Protection Systems for access Control Technologies*, 68 Fed. Reg. 62011 (31 October 2003) at 62016 and 62017 online: Federal Register <http://www.gpoaccess.gov/fr/search.html>.

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## VIII

### PROF. GEIST ASSERTION: P2P FILE SHARING DOES NOT HARM RIGHTS HOLDERS AND THERE IS NO REASON FOR ANY LEGISLATION TO ADDRESS ILLEGAL FILE SHARING

Prof. Geist asserts that P2P file sharing does not harm rights holders. In fact, according to him unauthorized file sharing is good for business. Prof. Geist relies upon a recent study commissioned by Industry Canada that examined the impact of P2P file sharing on sales of recorded music. His blog entry of November 2, 2007, is representative of the information he is telling Canadians:

“A study newly commissioned by Industry Canada, which includes some of the most extensive surveying to date of the Canadian population on music purchasing habits, finds what many have long suspected (though CRIA has denied) - there is a positive correlation between peer-to-peer downloading and CD purchasing...

Bear in mind, *this is not a study with a particular desired outcome or sponsor* - it is the government commissioning independent research to help it make better policy decisions...

The study is a tough read for the non-economist, yet given the breadth of its data and the importance of its findings, it is a must-read. When combined with the income generated from the private copying levy, much of which is seemingly linked to P2P copying, it becomes increasingly clear that the industry has benefited from P2P and that there is no ‘emergency’ that necessitates legislative intervention.”

Prof. Geist’s claims about the objectivity of the study do not stand up to scrutiny.

First, the primary author is Birgitte Andersen of the University of London. She has well documented anti-copyright and anti-music industry preconceptions. For example, in an article written in 2005 entitled “The Social and Economic Effects of Copyrights in the Music Industry,”<sup>53</sup> Ms. Andersen decries the

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<sup>53</sup> B. Andersen *et al.*, “The Social and Economic Effects of Copyrights in the Music Industry: A Contribution to the Convergence versus Divergence Debate”, in Fiona



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“cultural imperialism” of the music industry and asserts that copyright is a “weapon” used by “multinationals” to attack creativity. She believes that “the copyright system can act as a vehicle for the crude expression of commercial power relations and, in the specific case of music, a weapon by multinationals against the creative independence of small countries and producers.”

In another article she wrote that copyrights “are not a means to provide fair income to the music creators and their local cultural communities, but are for the grandness of commercial exploitation. . . . [The copyright system] may not only be an ethical problem but also a problem for the long-term success of the industry.”<sup>54</sup> Ms. Anderson went on to applaud unauthorized (i.e., infringing) P2P file sharing systems as an “innovative” distribution model.<sup>55</sup> In discussing the Napster decision, Ms. Andersen intimated that the Court’s decision shutting down the service for distributing millions of pirated music files was a setback to innovation.

In light of Ms. Anderson’s clear published preconceptions and opinions against copyright and the music industry it is misleading for Prof. Geist to characterize her study as objective and without “a particular desired outcome”.<sup>56</sup>

Second, the study has been harshly criticized by two prominent academics, Professor Stan Liebowitz, Director of the Center for Economic Analysis of Property Rights and Innovation at University of Texas, one of the leading econometric experts in the field of peer-to-peer file sharing, and Professor George Barker, the Director of the Centre for Law and Economics at Australian National University and the President of the Australian Law and Economics Association.

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Macmillan, ed. *New Directions in Copyright Law*, Vol I (Cheltenham: Edward Elgar, 2005) at 131-165.

<sup>54</sup> Birgitte Andersen & Fiona MacMillan, “Music and Intellectual Property Rights for Business and Society” (Paper presented at UNCTAD, Music Industry Workshop, 2001) [unpublished].

<sup>55</sup> *Ibid.*

<sup>56</sup> It is also surprising that Industry Canada would have crossed the Atlantic to select someone with such clear preconceptions and self-described anti-copyright opinions if it had really intended to commission an objective study of the effects of file sharing on sales of music.

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Professor Barker found the Andersen/Frenz study fundamentally flawed.<sup>57</sup> He concluded:

...we find the error in the report to be so serious as to completely undermine the conclusion it draws which renders much of the additional commentary and interpretation derived from it in the media (and blog columnists) quite misleading. ...We recommend the report be removed from circulation by Industry Canada pending its own independent review of the study. It is in the interests of Industry Canada's reputation that this review be conducted by reputable researchers (e.g. the editors of a major economic journal such as *Econometrica*), and that the results of the review be published by Industry Canada... We recommend that greater care should be taken in the selection and subsequent publication of research that may have policy implications.

Professor Liebowitz also reviewed the study. On first review, he stated that it didn't pass the "laugh test". On further examination he concluded that its findings were "*not only implausible but...actually impossible to be true, given their data*".<sup>58</sup>

Another troubling aspect of Prof. Geist's argument that P2P file sharing does more good than harm is his singular focus on the music industry. His narrow focus suggests that the case for or against WIPO implementation rests only with the health of the music industry, an industry he constantly attacks in his writings. However, as detailed above, there is broad support for WIPO implementation from representatives of all the cultural industries and well as the business community.

Prof. Geist's comments about the "income generated from the private copying levy, much of which is seemingly linked to P2P copying," is intended to convince readers that illegal file sharing does not hurt rights holders on the basis that the private copying levy compensates them for the substantial illegal copying arising from

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<sup>57</sup> See George Barker & Richard Booth, "A Review of 'Impact of Music Downloads and P2P File-Sharing on the Purchase of Music: A Study for Industry Canada'" (Presented at the ANU Center for Law and Economics, Working Paper No. 2, November 2007). CRIA commissioned this independent review of the Andersen study.

<sup>58</sup> Stanley Liebowitz, "Copyright Issues, Copying and MP3 File-Sharing" (7 November 2007), online: < <http://www.utdallas.edu/~liebowit/intprop/main.htm>>.

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illegal P2P file sharing. In fact, the private copying regime provides *no* compensation whatsoever for illegal downloading of music onto PCs, iPods and other devices such as digital audio recording devices (DARs).

In 2004 a tariff proposed by the CPCC on the memory in DARs was rejected by the Federal Court of Appeal.<sup>59</sup> The Federal Court of Appeal recently confirmed that there is has no legal authority to certify a tariff on digital audio recorders or on the memory permanently embedded in digital audio recorders.<sup>60</sup> Accordingly, the private copying levy does not, and never did, provide any compensation for illegal downloading of music unto PCs or DARs (the vast majority of unauthorized downloading). The current tariffs deal mainly with copying onto various types of CD media and audio cassettes.

Further, as a result of the eligible maker requirements in the Copyright Act, owners of sound recordings receive no compensation for approximately 78% of the private copies made onto qualifying audio recording media.<sup>61</sup> This means that sound recordings of international Canadian recording stars like Shania Twain, Avril Lavigne, Diana Krall, Michael Buble, k.d. lang, Bryan Adams, Simply Plan and Three Days Grace (to name only a few) receive no compensation whatsoever for unauthorized copying in Canada.

Prof. Geist's rationalization of illegal file sharing based on the private copying levy is also difficult to square with his simultaneous call for the Government to abolish the levy and his calls for "a clear, uncompensated exception to format shift".<sup>62</sup> Further, his arguments related to the private copying levy also fails to address that copyright owners of other cultural products, including books, software, and movies, receive nothing for file sharing over illegal P2P networks.

In support of his argument that no legislation is needed to protect rights holders against online infringement Prof. Geist also

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<sup>59</sup> *Canadian Private Copying Collective v. Canadian Storage Media Alliance*, 2004 FCA 424.

<sup>60</sup> *Apple Canada Inc. v. Canadian Private Copying Collective*, 2008 FCA 9.

<sup>61</sup> In the Copyright Board's most recent tariff only 22% of sound recordings were considered to be eligible for compensation. Canada, Copyright Board, *Private Copying 2005, 2006 and 2007* (11 May 2007) at 17-18, 39-43.

<sup>62</sup> Michael Geist, "Federal Court of Appeal Kills iPod Levy" (10 Jan 2008), online: Michael Geist Blog <<http://www.michaelgeist.ca/content/view/2552/125/>>.

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quotes statistics which indicate that digital music sales are growing. His January 4, 2007 blog entry is representative of his arguments in this regard:

Today's data further counters CRIA's claims, confirming that Canada has grown faster than the U.S. in key music sales areas for two consecutive years. Digital track sales grew by 73 percent in Canada last year, far faster the U.S. figure of 45 percent. Digital album sales grew by 93 percent in Canada compared with 53 percent in the U.S.

The statistics cited by Prof. Geist are presented in a misleading manner. What Prof. Geist fails to note is that while the relative growth in Canada's digital track and album sales may seem impressive, this is only because they are starting from a very low base point – considerably lower than in other countries, such as the U.S. Put in terms of absolute numbers, the sales are small. According to Nielsen SoundScan, 1.98 million digital albums were sold in Canada last year, which amounts to just 4.5 percent of the 44.4 million total albums sold.<sup>63</sup> In Canada digital downloads, subscription services and mobile music together comprise only 12 percent of total music sales. By contrast, in the U.S. these channels comprise 29 percent of sales. Nielsen's numbers, calculated on a per capita basis, generate a similar picture: in 2007, Canadians bought 0.78 digital tracks per capita, a fraction of the 2.8 digital tracks purchased by Americans.<sup>64</sup> Further, for the 11 months ended November 2007, net wholesale shipments of CDs, music DVDs, and other "physical" recorded music formats dropped 16 percent in the year-earlier period and the net wholesale value dropped 20 percent.<sup>65</sup> What Nielsen SoundScan's numbers really show is that, far from indicating impressive growth, Canada's digital sales are significantly below those in the U.S. and do not come close to making up for the sharp, long-term decline in sales of physical formats due in large part to unabated Internet file-sharing.

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<sup>63</sup> Nielsen SoundScan News Release, "Nielsen Music 2007 Music Industry Report for Canada," Jan. 4, 2008. <http://www.reuters.com/article/pressRelease/idUS214743+04-Jan-2008+BW20080104>

<sup>64</sup> Nielsen SoundScan, News Release, "2007 U.S. Music Purchases Exceed 1.4 Billion," (3 January 2008), online: <http://biz.yahoo.com/bw/080103/20080103006104.html?v=1>.

<sup>65</sup> See November 2007 Statistics, Canadian Recording Industry Association website, <http://www.cria.ca/stats.php>

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## IX

### PROF. GEIST ASSERTION: THE PROPOSED BILL SHOULD NOT BE ENACTED WITHOUT ALSO ADDRESSING OTHER COPYRIGHT REFORMS

Prof. Geist states that the current copyright reform initiative should be stalled until the Government also enacts legislation to “eliminate the private copying levy”, and to provide “flexible fair dealing”, a “parody exception” and other exceptions from infringement for “time shifting”, “device shifting” and an “expanded backup provision”.<sup>66</sup> These proposals to halt the current phase of copyright reform are disquieting for a number of reasons.

First, the government has already extensively studied, and consulted with Canadians, concerning the issues associated with WIPO implementation.<sup>67</sup> Canada helped to write and signed the treaties over 10 years ago. In the years since, there has been extensive consultation and debate in Canada on issues related to WIPO implementation including the policy issues associated with protection for TPMs. Further, as set out above, the vast majority of the developed world -- including all of Canada’s leading trading partners - - have *implemented* (i.e. adopted into law the requirements of) the WIPO Treaties. Canada has lagged behind long enough. There is no good policy reason to stall any longer for further debate on other issues.

Second, each of the issues raised by Prof. Geist involve significant policy questions that will take considerable time to get right. Prof. Geist does not disclose the considerable efforts that are needed to deal with these issues. For example, reforming the private copying regime is a very controversial issue. Reformers from all sides seeking to address it have a wide variety of inconsistent changes, including limiting permitted copying to legitimately acquired sources, limiting the media to which the levy and the exception from infringement applies to CD’s and other removable media, expanding

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<sup>66</sup> See Site Description, Geist blog entries November 27, December 6, 10, 2007. Micahel Geist, “UK Issues Public Consultation on More Flexible Copyright” (8 January 2008), online: Michael Geist Blog <<http://www.michaelgeist.ca/content/view/2543/125/>> (“Rather than pushing forward with the ill-advised Canadian DMCA, [the government] should start with a comprehensive digital copyright consultation early in 2008”).

<sup>67</sup> See above,

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the regime to include DARs and other devices, removing the discrimination against foreign copyright holders, and eliminating the levy and the private copying regime in its entirety.

Further, the Government has only just started its consultations on whether to enact a series of specific exceptions to infringement such as those proposed by Prof. Geist, or a more general exception for fair use as currently exists in the U.S. As far as I am aware, two reports have so far been commissioned by the Government to study the fair use question. One study, published by Prof. Giuseppina D'Agostino of Osgoode Hall Law School, identified numerous problems with the U.S. fair use model and concluded that the development of a Canadian model would have to consider a myriad of factors before settling on what would make sense for Canada.<sup>68</sup>

Fair dealing cannot be addressed in a vacuum. One must revisit the entire CCA and study what its objectives are, where the balance is being struck. Are right holders the so-called winning parties? Whose interests is copyright law meant to serve?...

Some commentators have championed that Canada adopt US fair use. This would entail "cherry-picking" from the US cadre of copyright laws and taking from it its fair use provision. There are problems with this approach. First, as noted from eminent US studies, fair use is "ill" and not the panacea approach that many, perhaps in Canada, proclaim... Second, cherry-picking a law, likely also means taking from its jurisprudence (and neglecting other constitutive factors, such as a Constitution)... Singapore has cherry-picked US fair use, however its courts are reluctant to consider US fair use cases causing much disorder...

Prof. Geist suggests that the Government shelve the current bill until all these issues are thoroughly addressed, or:

"use the next six weeks to develop a consultation paper that outlines its preferred approach and invite all Canadians to comment. A winter consultation could lead to a new bill by

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<sup>68</sup> Giuseppina D'Agostino, "Healing Fair Dealing? A Comparative Copyright Analysis of Canadian Fair Dealing to UK Fair Dealing and US Fair Use" (2007). *Comparative Research in Law and Political Economy*, research paper 28/2007 vol. 03 no. 4.

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late spring, still offering the chance to reform Canadian copyright law in 2008.”

As anyone familiar with the copyright amendment process knows, it is simply not feasible to thoroughly canvass these issues, have broad public consultation, make policy choices and do the required legislative drafting in such a short time period. So Prof. Geist’s proposal can reasonably be viewed as an attempt to halt the current bill from being enacted now in the hope that a future Government will take a different approach to WIPO implementation.

Third, Prof. Geist’s proposal to shelve the bill until all the issues he wants addressed are dealt with is contrary to the policy adopted in the Section 92 Report and widely acknowledged as the only manageable approach to timely enactment of copyright reform. That Report accurately noted what all serious observers of copyright reform in Canada have acknowledged: that the tendency to “pile on” issues has habitually stalled major copyright reform in Canada, to the point where major reform takes a decade or more. Therefore, the Report recommended, and virtually no submissions to the government disagreed, that copyright reform should be prioritized and addressed in manageable tranches. Prof. Geist does not disclose that the Section 92 Report indicated an intent to consider the issues he is concerned about in later phases of copyright reform, following WIPO ratification.

Chapter 3 of the Section 92 Report proposed the following:

“a copyright reform agenda that deals with issues packaged together according to a common thematic denominator for which policy work and legislative change can be reasonably and effectively achieved in a balanced, step-by-step manner. These thematic linkages are based on public policy needs, international pressures, categories of works or issues relevant to specific industry or cultural sectors.”

The agenda comprised three groupings of issues – reform buckets – to effect legislative change over the short, medium and long term.

The government appears to have adopted this approach with respect to the first, short term, grouping. The short term grouping included those issues that were in Bill C-60 and which are expected to be dealt with in the proposed bill:

These issues include ISP liability and three WCT and WPPT digital issues for which consultations and

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preliminary policy analysis have taken place: making available right (refer to Chapter 2: A.1.10); legal protection of rights management information (refer to Chapter 2:A.1.13); legal protection of technological measures (refer to Chapter 2: A.1.15); and, ISP liability (refer to Chapter 2: A.3.4).

The Section 92 Report proposed to deal with these issues first because they reflect “issues for which policy work is well under way, as well as issues requiring *urgent* attention.”<sup>69</sup> According to the Report, “Dealing with these issues in a timely way is critical to maintain the responsiveness of the Act to technological innovation, to preserve the integrity of the Act in terms of creators’ rights and users’ needs, and to take account of international trends and developments.” Again, virtually no submissions disputed this conclusion, or disputed the approach of prioritizing and addressing copyright reform issues in manageable bites.

The second and third groupings consisted of issues that the government had been working on or was beginning to work on “but that, for various reasons, are not yet ripe for legislative amendment”. The government specifically identified the private copying regime as a medium term issue that has to be addressed. The medium term issues also included “remaining and new issues arising from the use of digital technologies and Internet practices”, which along with the private copying levy issue presumably include consideration of the specific exceptions from infringement Prof. Geist has proposed. The Report explained, “This grouping embraces a host of important issues requiring further research and analysis, as well as ongoing monitoring and evaluation of international developments to support the Government of Canada’s assessment of the need for legislative amendment.”

The approach set out in the Section 92 Report correctly acknowledged that actions which delay the enactment of the “urgent” phase one grouping of reforms will only delay the Government’s ability to move to address the medium and longer term issues that also need attention. The overwhelming consensus of copyright practitioners and observers of copyright reform in Canada was that such an approach was the only practical means of adopting any

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<sup>69</sup> Emphasis added.



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copyright reform provisions in the near to mid-future. Prof. Geist's Facebook site and Prof. Geist's linked blogs, however, seem to ignore the general consensus on how to practically achieve any needed copyright reform. Accordingly, Prof. Geist's attempts to delay passage of the proposed bill, in effect, is delaying the Government's ability to deal with the very issues that Prof. Geist and others would like to see canvassed.

X

PROF. GEIST ASSERTION: THE DMCA WILL ELIMINATE FAIR DEALING  
AND NEGATIVELY IMPACT CONSUMER'S USE OF WORKS

Prof. Geist claims that a DMCA-style bill will *eliminate* fair dealing in Canada. Prof. Geist states:

“While Bill C-60 had its faults, it did attempt to strike a balance and preserve fair dealing rights in Canada. Prentice's Canadian DMCA by contrast will largely eliminate fair dealing in the digital world.”

This statement has little basis in fact and is misleading rhetoric which the legal impact of the proposed bill, even assuming it is the DMCA-style bill Prof. Geist, proclaims it to be.

First, the DMCA expressly preserves all rights of fair use under copyright. Accordingly, it is incorrect and misleading to state as a matter of law that the DMCA “will largely eliminate fair dealing in the digital world”. Its provisions expressly retain rather than negate such rights.

Secondly, the DMCA does not prohibit an individual's circumvention of a copy control TPM for a fair use or any other purpose. The DMCA does prohibit circumventing an access control TPM for any purpose and imposes a ban on trafficking in or the marketing of any device that circumvents copy or access control restrictions, including those that might facilitate a fair use. This prohibition against trafficking in tools that circumvent use restrictions is based on the policy choice necessary to protect against piracy. Congress was willing to make this choice in order to protect against unlawful piracy and to promote the development of electronic commerce and the availability of copyrighted material on the

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Internet.<sup>70</sup> Accordingly, even under the DMCA, there is only a partial legal ability to control circumvention that could impact fair use purposes.

Third, experience in the U.S. does not bear Prof. Geist's inflammatory predictions about the near total "elimination" of fair dealing in the digital environment.<sup>71</sup> Copyright owners have every incentive to make works available in a way that they can be productively used by consumers. Ultimately copyright owners must answer to the demands of the marketplace. Rights holders who simply "lock up" content in a way that unreasonably impedes user desires will fail in the market.

The experience of the past decade empirically demonstrates that U.S. consumers have had extensive access to a great wealth of cultural products including books, games, software, films and television shows through a plethora of services and delivery models, and at a variety of reasonable price points, following the enactment of the DMCA. Far from the "lock up" that Prof. Geist predicts, U.S. copyright law has facilitated new business models that make cultural products widely accessible to consumers, in a manner that supports, rather than purloins from, cultural industries.

For example, a large variety of services available in the United States that enable consumers to access filmed entertainment via a variety of online choices. Many of the business models that enable the wide range of consumer choices depend on TPMs—whether they are subscription based, download to own, ad-based streaming, or "rental". Amazon Unbox,<sup>72</sup> CINEMANOW,<sup>73</sup> DIRECT2DRIVE,<sup>74</sup> MOVIELINK,<sup>75</sup> STARZ! VONGO<sup>76</sup>, and iTunes movie rentals<sup>77</sup> are just

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<sup>70</sup> See *U.S. v. Elcom Ltd.*, 203 F.Supp.2d 1111 (N.D.Cal. 2002).

<sup>71</sup> See June Besek, "Anti-Circumvention Laws and Copyright: A Report From the Kernochan Center for Law, Media and the Arts" (2004) 27 *Colum. J. L. & the Arts* 389 at 446-66.

<sup>72</sup> [www.amazon.com/unbox/](http://www.amazon.com/unbox/) offers downloads of movies and television shows to computer, copying to portable devices, and limited time rental. .

<sup>73</sup> [www.cinemanow.com](http://www.cinemanow.com) offers downloads, subscriptions, and rental options for delivery.

<sup>74</sup> [www.direct2drive.com](http://www.direct2drive.com) offers digital catalog of games, movies, TV shows for download on computers or any other Windows-based device, including portable media players and mobile phones.

<sup>75</sup> [www.movieline.com](http://www.movieline.com) offers downloads of movies, TV shows and other popular videos for rental or purchase on a PC, TV, or laptop.

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a few of the innovative business models that have developed in the years following the enactment of the DMCA. In book publishing, the e-book reader and audio books<sup>78</sup> are becoming a consumer reality in the United States. Publishers and authors rely on TPMs to protect their investments in this type of content. Far from seeing a decline or “lock up” of content, these new services provide for a broad dissemination of works and growing varieties of ways for consumers to access works by methods convenient to them.

Fourth, the U.S. Copyright Office has now conducted three separate sets of hearings mandated by the DMCA to determine whether there are particular classes of works as to which users are, or are likely to be, adversely affected in their ability to make noninfringing uses due to the prohibition on circumvention of access controls in the DMCA. The first section 1201 rulemaking took place in 2000, and on October 27, 2000, the Librarian of Congress determined that noninfringing users of two classes of works would not be subject to the prohibition on circumvention of access controls.<sup>79</sup> The second rulemaking culminated in the Librarian’s October 28, 2003, announcement that noninfringing users of four classes of works would not be subject to the prohibition on circumvention of access controls.<sup>80</sup>

The third hearing was conducted between October 3 2005 and November 2006. The hearings were preceded by requests for comments from all interested parties, including representatives of copyright owners, educational institutions, libraries and archives, scholars, researchers and members of the public. In this hearing the Copyright Office received 74 comments and 35 reply comments. Following the hearings, only six limited classes (which included

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<sup>76</sup> [www.starz.com](http://www.starz.com) offers online downloads.

<sup>77</sup> <http://www.apple.com/itunes/store/movies.html>

<sup>78</sup> Audio books (my personal favourite) can be acquired from a variety of sites including itunes.com and audible.com.

<sup>79</sup> Federal Register: January 21, 2005 (Volume 70, Number 12), online: <<http://www.copyright.gov/fedreg/2005/70fr3231.html#3>>.

<sup>80</sup> Federal Register: January 21, 2005 (Volume 70, Number 12), online: <<http://www.copyright.gov/fedreg/2005/70fr3231.html#4>>.

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renewals from previous hearings) were considered worthy of an exception.<sup>81</sup>

Significantly, some commentators had argued that the DMCA adversely affects consumer rights and that all works should be exempt for a variety of purposes including fair use purposes. The request for such exceptions was expressly rejected because the requestors, after a decade of actual experience under the DMCA, had not “articulated a sufficient class or provided sufficient evidence of adverse effects by the prohibition on noninfringing uses that would allow the articulation of a cognizable class.”

Some commentators (like Prof. Geist) had also argued for an exception for a class of works protected by access controls that prevent the creation of back-up copies. Proponents made assertions such as that it is common sense to make back-up copies of expensive media such as CDs and DVDs due to their alleged fragility. A request for this exception was also rejected. The U.S. Register of Copyright found that proponents failed to

offer facts that would warrant a conclusion that media such as DVDs and CDs are so susceptible to damage and deterioration that the practice of making preventive backup copies should be noninfringing.

The unauthorized reproduction of DVDs is already a critical problem facing the motion picture industry. Creating an exemption to satisfy the concern that a DVD may become damaged would sanction widespread circumvention to facilitate reproduction for works that are currently functioning properly. The Register finds that the record does not justify the proposed exemption.

Fifth, Prof. Geist also asserts that the proposed law if based on the DMCA “will be used to create unfair limitations on what consumers can do with their own personal property”. For example, he asserts that the proposed bill “could make it illegal for Canadians to unlock their cellphones” like the new Apple iPhone to work on

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<sup>81</sup> Rulemaking on Exemptions from Prohibition on Circumvention of Technological Measures that Control Access to Copyrighted Works, online: <<http://www.copyright.gov/1201/>>; Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Federal Register: November 27, 2006 (Volume 71, Number 227), online: <<http://www.copyright.gov/fedreg/2006/71fr68472.html>>.

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different networks.<sup>82</sup> Yet, he knows (as he has publicly acknowledged) that the U.S. recently created an exemption to allow consumers to legally unlock their cellphones.<sup>83</sup> He goes even further asserting that a Canadian DMCA could make "everyday habits" illegal.<sup>84</sup> This statement is exaggerated and misleading rhetoric.

Sixth, his reference to "unfair" can only be answered by weighing the policy rationale for legislation like legal protection for TPMs with the likely or unlikely negative impacts of such legislation. The core objectives of the WIPO Treaties are to bring copyright laws into the digital age, to protect rights holders from the potential for massive theft on the Internet, and to create a favourable legal infrastructure to enable the market for digital content to flourish. The objectives of these treaties are intended to benefit *all* stakeholders with an interest in copyright including creators, rights owners and users. Prof. Geist's writings focus singularly on the potential negative impacts of such protections. He never attempts to weigh the potential benefits of TPMs against the theoretical harms.

The readers of his blogs get none of the "balance" about copyright that he professes as being important.<sup>85</sup>

## XI

### PROF. GEIST ASSERTION: THE PROPOSED BILL WILL PREJUDICE THE PRIVACY OF CONSUMERS

Prof. Geist claims that the proposed bill will have detrimental effects on privacy.<sup>86</sup> These claims are incorrect.

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<sup>82</sup> Michael Geist, "Tories' Cellphone Misdial", TheTyee.ca, (4 December 2007), online: <<http://thetyee.ca/Mediacheck/2007/12/04/CellPhoneMisdial/>>.

<sup>83</sup> Michael Geist, "Unlocking the mystery of locked phones", *The Toronto Star*, (3 September 2007), online: The Toronto Star <<http://www.thestar.com/Business/article/252554>>; See Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, *infra*, exception 5.

<sup>84</sup> Prof. Geist is quoted asserting this in a Canwest article: Mike De Sousa, "Plan to modernize copyright law could make everyday habits illegal" *CanWest News Service* (6 January 2008), online: The National Post <<http://www.nationalpost.com/news/canada/story.html?id=219503>>, which he refers to in Michael Geist, "Mainstream Media Picks Up Where it Left Off on Copyright" (7 January 2008), online: <http://www.michaelgeist.ca/content/view/2532/125>.

<sup>85</sup> See *Sookman Replies to Prof. Geist*.

<sup>86</sup> See Geist blog entries December 2, 10, 17, 2007.

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First, Prof. Geist's statements fail to distinguish between TPMs for which legal protection will likely be provided and DRMs for which no protection will be provided (other than any portion thereof that comprises TPMs). The term "TPM" is generally used to refer "to technologies that control access to or use of information, or both." The term DRM is generally understood as "a system, comprising technological tools and a usage policy that is designed to securely manage access to and use of digital information."<sup>87</sup> Neither the DMCA nor any other legislation that I am aware of provides legal protection for the digital rights management software applications that can be used to collect personal information of consumers.

From a privacy perspective, legal protection for TPMs is very similar to protecting computer systems such as banking systems from unauthorized hacking. Protection for the security layer of the system in no way results in any loss of privacy or the violation of any privacy laws. Similarly, the legal protection of TPMs against circumvention in no results in or contributes to the violation of any privacy rights.

Second, the fact that DRM can be used to collect, use and disclose personal information in no way suggests that their legal protection would diminish the applicability of privacy laws to their use. Like myriad other technologies, systems and services ubiquitously available that collect information from consumers, use of DRMs in Canada is subject to PIPEDA and other applicable provincial legislation. This legislation has contributed to giving Canada one of the best privacy records in the world.<sup>88</sup> Any suggestion that legal protection for TPMs (or even DRM) would somehow sanction a violation of generally applicable privacy laws is simply false.

Prof. Geist in his writings relies upon a letter written by Privacy Commissioner of Canada Jennifer Stoddart in which the Privacy Commissioner warned "Industry Minister Jim Prentice and Canadian Heritage Minister... against copyright reforms that "could have a negative impact on the privacy rights of Canadians."<sup>89</sup> He

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<sup>87</sup> See Canadian Internet Policy and Public Interest Clinic, "Digital Rights Management and Consumer Privacy" September 2007 at Section 1.1.

<sup>88</sup> Canada was recently ranked among the three best countries in a recent survey conducted by Privacy International. See, [http://www.iht.com/articles/2007/12/30/business/privacy.php?WT.mc\\_id=techalert](http://www.iht.com/articles/2007/12/30/business/privacy.php?WT.mc_id=techalert).

<sup>89</sup> Michael Geist, "Privacy Commissioner of Canada Warns Against Weakening Privacy Through Canadian DMCA." (18 January 2008), online:

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states that “Stoddart’s public letter provides an important reminder that it is more than just copyright law that hangs in the balance as the government's plans could ultimately place Canadians' privacy at risk.”

However, the Privacy Commissioner cannot be concerned that any proposed legislation to protect TPMs would override the Personal Information Protection and Electronic Documents Act (PIPEDA) or any other privacy legislation. Both Prof. Geist and the Commissioner are surely aware that section 4(3) of PIPEDA is very explicit in providing that:

“(3) Every provision of the Part applies despite any provision, enacted after this subsection comes into force, of any other Act of Parliament, unless the other Act expressly declares that that provision operates despite the provision of this Part.”

Bill C-60 did not contain any such override provision and there is no reason to believe that the proposed bill will contain such a provision. Accordingly, PIPEDA will take precedence over the copyright legislation and provide continuing protection for the privacy rights of Canadians.

Further, the gravamen of the Commissioner’s concern is about legalizing “the authorized use of technical mechanisms to protect copyrighted material that resulted in the collection, use and disclosure of personal information without consent.” The purpose of the proposed amendments to the Copyright Act is to implement the obligations which Canada undertook in connection with its commitment to ratify the WIPO Treaties. Nothing in these treaties requires or even contemplates the abrogation of generally applicable privacy principles or the sanctioning of the collection, use or disclosure of personal information without consent.

Legislation to adopt the WIPO Treaties has been enacted by all of Canada’s major trading partners without abrogating generally applicable privacy protections. The European Union, which has very strong privacy laws, has adopted the EU Copyright Directive, which requires each of its members states to provide legal protection for

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<<http://www.michaelgeist.ca/content/view/2589/125/>>; Michael Geist, “Privacy Commissioner Warns Against Copyright Reform's Threat to Privacy” (21 January 2008), online: < <http://www.michaelgeist.ca/content/view/2590/159/>>.

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TPMs. Every EU member state has implemented the provisions of the treaties. In no case has such legislation been found to impinge on privacy laws and there is no reason whatsoever to believe that Canadian legislation would do so.

The Commissioner also appears to have no issue with the legal protection for TPMs, the technology that would be protected under any legislation enacted to ratify the WIPO Treaties. She says "If DRM technologies only controlled copying and use of content, our Office would have few concerns." Thus, her main concern is with use of DRMs in a way that violates privacy laws, not TPMs.

Prof. Geist also quotes from the Privacy Commissioner to make the point that "allowing a private sector organization to require an ISP to retain personal information is a precedent-setting provision that would seriously weaken privacy protections."

This concern overstates the amount and nature of the personal information that may be required to be retained under a Notice and Notice regime. Bill C-60, for example, contained detailed provisions, which would have been augmented by regulation, regarding the content of the notice. The retention period was only 6 months, unless proceedings were commenced by the claimant within that period, with a 1 year maximum, unless there were some intervening court order. The only information required to be retained was information that would allow the identification of the person to whom the electronic location identified in the notice belonged. That would be the current IP address holder identification information, as of the date of the Notice.

As the Federal Court of Appeal noted in the *BMG Canada* case,<sup>90</sup> where plaintiffs show that they have a bona fide claim that unknown persons are infringing their copyright, they have a right to have the identity revealed for the purpose of bringing action. The Notice and Notice provisions simply provide for a mechanism whereby the information may be preserved pending a decision by the courts as to whether it has to be disclosed in the course of legal proceedings. This is not really any different than any other situation where a third party receives a notice that documents in its possession may be the subject of a third party discovery order. A third party in those circumstances would be acting completely irresponsibly if it did

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<sup>90</sup> *BMG Canada Inc. v. Doe*, 2005 F.C.A. 193.



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not retain those documents for a reasonable period pending the receipt of a court order.

Any notice and notice provisions that may be in the proposed bill would be a reasonable attempt to balance the privacy interests of users of copyrighted material in the modern context with the need to protect the rights of the originators of the copyrighted material. As the Federal Court of Appeal commented in the BMG case:

“Intellectual property laws originated in order to protect the promulgation of ideas. Copyright law provides incentives for innovators – artists, musicians, inventors, writers, performers and marketers – to create. It is designed to ensure that ideas are expressed and developed instead of remaining dormant. Individuals need to be encouraged to develop their own talents and personal expression of artistic ideas, including music. If they are robbed of the fruits of their efforts, their incentive to express their ideas in tangible form is diminished.

Modern technology such as the Internet has provided extraordinary benefits for society, which include faster and more efficient means of communication to wider audiences. This technology must not be allowed to obliterate those personal property rights which society has deemed important. Although privacy concerns must also be considered, it seems to be that they must yield to public concerns for the protection of intellectual property rights in situations where infringement threatens to erode those rights.”

Regimes for retention and disclosure of personal information exist in other countries reflecting the acceptable balance between protection of privacy and the interests of rights holders.

## XII

### PROF. GEIST ASSERTION: THE PROPOSED BILL WILL PREJUDICE FREE SPEECH

Prof. Geist claims that the proposed bill will have detrimental effects on free speech.<sup>91</sup> This claim also does not withstand scrutiny. This same claim has been made by detractors of the DMCA in the U.S.

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<sup>91</sup> See Geist blog entries December 2, 10, 17, 2007.

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and has been consistently rejected by U.S. courts that have examined the claim. Simply put, the DMCA does not violate First Amendment rights in the United States.<sup>92</sup>

### XIII

#### PROF. GEIST ASSERTION: THE GOVERNMENT DOES NOT HAVE THE CONSTITUTIONAL ABILITY TO ENACT LEGISLATION RELATED TO TPMS

Prof. Geist claims that there are “potential constitutional validity” issues associated with “a Canadian DMCA that would represent a significant incursion into provincial jurisdiction.” In particular, he claims that “the ‘para-copyright’ provisions found in anti-circumvention legislation are better characterized as laws related to property (a provincial matter) rather than copyright (a federal matter).”<sup>93</sup> This claim is open to substantial doubt.

First, Section 91.23 of the Constitution gives Parliament exclusive jurisdiction over “Copyrights”. The Supreme Court of Canada has stated that copyright in Canada “is a creature of statute and the rights and remedies it [the statute] provides are exhaustive”.<sup>94</sup> Copyright is concerned with balancing the public interest in the encouragement and dissemination of the works and preventing “someone other than the creator from appropriating whatever benefits may be generated.”<sup>95</sup> The proper approach has evolved, and continually needs to be re-evaluated from time to time, in response to technological change and to reflect international developments. Parliament has the right to establish the appropriate approach including deciding how best to protect works and other subject matter against piracy.

Second, it seems obvious that legislation (1) whose object is to enable rights holders to prevent the unauthorized exercise of their exclusive rights, (2) which is enacted to implement copyright treaties like the WIPO Treaties, and (3) which has been implemented around

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<sup>92</sup> See e.g., *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, (2nd Cir. 2001).

<sup>93</sup> See Ten Questions for Industry Minister Jim Prentice, *supra* note 10, and Michael Geist, “The Canadian DMCA: What you Can Do” (2 December 2007), online: <<http://www.michaelgeist.ca/content/view/2431/125>

<sup>94</sup> *Théberge v. Galerie d’Art du Petit Champlain Inc.*, [2002] 2 S.C.R. 336.

<sup>95</sup> *Ibid.*

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the world as part of copyright legislation, would be in pith and substance copyright.<sup>96</sup>

Third, legislation protecting TPMs is in pith and substance copyright because, like the private copying levy in Part VIII of the Act, it would be “created for the purpose of supporting the creators and the cultural industries by striking a balance between the rights of creators and those of users.”<sup>97</sup>

Fourth, the provisions in the *Radiocommunication Act* which prohibit decoding encrypted programming signals or network feeds or trafficking in devices that do so have been enforced by the Supreme Court of Canada.<sup>98</sup> It is not plausible to assert that laws designed to prevent the decoding of devices that protect programming signals would be enforced while devices that protect encryption protecting works and other subject matter from being broken would not be.

## XIV

### CONCLUSION

The debate about copyright reform is important and Facebook is a useful forum for facilitating this debate. In my view, however, an informed and rational debate about these policy issues can only result from the dissemination of information that is objective and fair. In my opinion the information that Prof. Geist’s has posted and linked to the FFCC do not meet these standards. I have endeavored to highlight some of the examples including:

- The polemic nature of the Site Description.
- The attempt to leverage anti-American sentiments to shift the debate away from the real policy questions faced by Canadians.
- The allegation that the bill, which he presumably has not seen, is a “sell out” to the U.S. even though legislation similar to the DMCA has been almost universally adopted throughout the developed world and is supported by the Canadian

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<sup>96</sup> See *Kirkbi AG v. Ritvik Holdings Inc.*, 2005 SCC 65.

<sup>97</sup> See *Canadian Private Copying Collective v. Canadian Storage Media Alliance*, 2004 FCA 424.

<sup>98</sup> *Bell ExpressVu Ltd. Partnership v. Rex*, 2002 SCC 42.

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cultural community and leading organizations that represent Canadian businesses.

- The suggestion that the WIPO Treaties have not been widely implemented by the reference to treaty “ratifications” when the treaties have been implemented by all of Canada’s leading trading partners.
- His suggestion that Canada has great flexibility in how it implements the WIPO Treaties without disclosing that this flexibility is in fact constrained by the treaty requirements that there be “adequate legal protection” and “effective legal remedies” against the circumvention of TPMs.
- The suggestion that Canadians have not been consulted about the policy issues associated with implementing the WIPO Treaties.
- His attempts to hold up copyright reform until other issues are dealt with without disclosing that the Section 92 Report stated an intention to address the issues he wants addressed later in accordance with the accepted approach laid down in that Report.
- His assertions that file sharing does not harm the Canadian cultural industries and his reliance on biased information.
- His inaccurate description of the operation of the private copying regime which he suggests provides compensation for illegal downloading onto iPods and other MP3 players and computers when it provides *no* compensation whatsoever for this illegal activity.
- The clear message that the DMCA is “bad” legislation with no disclosure of the positive support it garners in the U.S. or the comprehensive studies in the U.S. that have found it to be successful in meeting its policy objectives.
- The exaggerated and misleading statements that a “Canadian DMCA” will “eliminate fair dealing” in Canada and even make “everyday habits” illegal. He does not disclose that three consecutive U.S. reviews of the DMCA found little need to

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adopt further exceptions to prevent digital “lock up” of information nor does he attempt to even acknowledge the burgeoning market for digital woks in the U.S. under the DMCA.

- His confusion between DRMs and TPMs to suggest that there are privacy implications associated with giving legal protection to TPMs.
- His suggestion that a Canadian DMCA will have detrimental effects on free speech without disclosing that the courts in the U.S. have rejected this claim.

The unfortunate consequence of these fundamental flaws in the FFCC is that the public has missed out on a golden opportunity for an informed debate on the important issues facing this country. Another regrettable result may be that the FFCC could become a forum for people who come to believe that all content should be free and that there is no reason to provide a legal infrastructure to compensate authors or creators. In fact it has already been observed that Prof. Geist’s “ideas have been co-opted by people who don't think they should ever have to pay for anything.”<sup>99</sup>

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<sup>99</sup> Steven Sandor, “The looneys take the fight to Facebook” *Vue Weekly* (9 January 2008), online: <<http://www.vueweekly.com/articles/default.aspx?i=7843>>.

“...it's interesting that many of the people who have shown support for Geist's arguments and signed on to the Facebook site don't come close to getting the point...once you read the posts on his Facebook group, you can see that his ideas have been co-opted by people who don't think they should ever have to pay for anything. The site is now filled with posts from people arguing that no copyright law at all is needed...

I love arguments that quote stats and sources without actually citing them. Truth is, retail chains like Sam's and Music World have closed their doors, and Recording Industry Association of America stats show that online sales are not making up the loss in physical CD sales. They don't even make up close to 20 per cent of the market yet.

The problem for Geist and his supporters: their legitimate concerns are being eroded by a bunch of yahoos who have signed on in the hopes of having an unregulated Internet. And, sooner or later, the lunatics may take over the asylum-and Geist will be forced to distance himself from his own supporters.”