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# Copyright Consultations Submission

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## COPYRIGHT CONSULTATIONS SUBMISSION\*

Michael Geist<sup>†</sup>

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*In this submission, the author presents seven principal proposals for reform that he argues would foster innovation, creativity and marketplace success. First, he argues for an expanded fair dealing provision that would enhance its flexibility. His second reform proposal engages with the issue of anti-circumvention provisions, where he argues: 1) for a direct link between anti-circumvention provisions and copyright infringement; 2) against bans on devices that can be used to circumvent technological protection measures (provided that it has non-infringing uses); 3) for the creation of authorized circumventers; and 4) for a positive requirement to unlock for exceptions/right of access. The author then moves on to a consideration of intermediary provisions, and argues for the establishment of a legal safe harbor in the form of a “notice and notice” takedown system for internet intermediaries and a useful provision for Information Location Tool Providers, while rejecting the “three strikes” system adopted in other jurisdictions. Fourth, the author proposes reforming the backup copy provision and rationalizing the statutory damages provisions as a means of modernizing copyright law. The fifth reform proposal involves enhancing the public domain, by rejecting an extension in the copyright term and abolishing Crown copyright. Sixth, library provisions should rely on fair dealing provisions, while there should be no internet exception for education. Lastly, it should not be possible to contract out of the core protections and policies underlying the copyright balance.*

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\* © 2009 Michael Geist. This paper is a revised version of Michael Geist’s Copyright Consultation Submission of September 11, 2009.

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I was grateful for the opportunity to participate at the copyright roundtable held in Gatineau, Quebec this past July.<sup>1</sup> This submission supplements those comments with additional specifics on recommended reforms. My comments are provided in my personal capacity as a Canadian with a keen interest in the future of Canadian copyright.

#### COPYRIGHT REFORM PROCESS

Before addressing the consultation questions, I have two comments about process. First, thank you to Industry Minister Clement and Canadian Heritage Minister Moore for launching this consultation. As promised, it has been fair, transparent, and accessible to all Canadians.

Second, this consultation should be viewed as the start of an ongoing process to craft Canadian copyright law. Once a bill is tabled, it is essential that Canadians again have the opportunity to register their views through an open, comprehensive committee process. Moreover, Canadians should determine the shape and scope of Canadian copyright law. International treaty negotiations, particularly the ongoing Anti-Counterfeiting Trade Agreement discussions, should not effectively pre-determine domestic reforms. The ACTA negotiations have generated considerable concern among many Canadians and the government should demand that those negotiations be conducted in an open manner with the release of draft text for public comment.

#### WHY DOES COPYRIGHT MATTER?

The consultation's first question is also the most personal since the answer will be different for almost everyone.

For me, copyright matters because I am a professor and my students need access to copyrighted materials and the freedom to use those materials. It matters because I am a researcher who needs assurance that as materials are archived they will not be locked down

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<sup>1</sup> Gatineau - Round Table and Public Hearings on Copyright" (29 July 2009) <<http://www.ic.gc.ca/eic/site/008.nsf/eng/00439.html>>.

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under digital rights management. It matters because I am deeply concerned about privacy and fear that Digital Rights Management (“DRM”) could be harmful to my personal privacy. It matters because I have created videos and need flexibility in the law to allow for remix and transformed works and do not want my content taken down from the Internet based on unproven claims. It matters because I am a writer and I need certainty of access to speak freely. It matters because I am a consumer of digital entertainment and I want the law to reasonably reflect the right to view the content on the device of my choice. It matters because I am a parent whose children have only known life with the Internet and I want to ensure that they experience all the digital world has to offer. It matters because I live in a city with a strong connection to the digital economy and we need forward-looking laws to allow the next generation of companies to thrive. It matters because I am a proud Canadian who wants laws based not on external political pressure, but rather on the best interest of millions of Canadians.

#### HOW TO REMAIN RELEVANT?

Developing copyright law principles that remain relevant years from now is unquestionably a difficult challenge. With references to VHS tapes and the decision to block network-based PVR services, Bill C-61 was outdated the moment it was introduced. In order to introduce legislation that will stand the test of time, the government needs a principle-based, forward-looking approach. I would argue that there are four essential ingredients.

First, copyright law should strive for balance between creator rights and users’ rights. If the law tilts too far in one direction, the other side is virtually guaranteed to put the issue of reform back on the table and the changes do not last.

Second, the law must be technologically neutral. Copyright has proven remarkably resilient over the decades in large measure because it states broad principles about the scope and limits of protection. If copyright veers too far toward specific technologies by mandating new protection for specific business models or technological innovations, those rules risk being overtaken as the technologies and marketplace evolve.

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Third, the law should strive for simplification and clarity. Copyright may once have been a niche issue understood by a small number of experts, yet today it affects the daily lives of millions of Canadians. If Canadians are to respect the law, they must first understand it. When Bill C-61 proposed a 12-part test to determine whether recording a television program was legal, it rendered the law far too complex for the average person.<sup>2</sup>

Fourth, the law should embrace flexibility, which has allowed many copyright provisions to adapt to continually changing economic and technology environments. Flexibility takes a general purpose law and ensures that it works for stakeholders across the spectrum, whether documentary film makers, musicians, teachers, researchers, businesses, or consumers.

Flexibility applies not only domestically but at the international level as well. The same challenges we face on the domestic front are only magnified at the international level in treaties. That means that those treaties – particularly the WIPO Internet treaties – are more flexible than is often appreciated. Compliance with those treaties can be achieved in many ways and following a single model – such as the U.S. Digital Rights Millennium Act (“DMCA”)<sup>3</sup> – is not needed to meet the standard.

### WHAT TO DO?

The final three consultation questions really ask the same thing with slightly altered perspectives – what should we do to foster innovation and creativity, competition and investment, and to position the country as a leader in the digital world. At its heart, each of these questions is asking for comments on proposed reforms that are forward-looking and ensure that the goals of innovation, creativity, and marketplace success are met. While it is possible to answer each individually, there is considerable overlap. For example, a more flexible fair dealing provision has benefits for innovation, for creativity, for competition, and for the digital economy. The same is true for anti-circumvention provisions that retain the copyright balance.

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<sup>2</sup> [Bill C-61](#), *An Act to Amend the Copyright Act*, 2nd Sess., 39th Parl., 2007-2008 [Bill C-61].

<sup>3</sup> [Digital Millennium Copyright Act](#), 17 U.S.C. (1998) [DMCA].

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In an ideal world, we might start from scratch to create a law that truly makes sense in the current environment. We are not starting from scratch, however. The reality is that there is an international context with treaties we have ratified (Berne Convention)<sup>4</sup> and treaties we have signed but not yet implemented (WIPO Internet treaties)<sup>5</sup>. Moreover, there is a domestic context, with Bill C-61 surely used as a reference point.

My response focuses on seven areas of copyright reform.

#### 1. FLEXIBLE FAIR DEALING

Expand the fair dealing provision by adding flexibility through the addition of “such as” to the current wording.

Led by the United States, several countries around the world have established fair use provisions within their copyright laws (Israel being the most recent). Fair use does not mean free use – rather, it means that there is a balance that allows certain uses of works without permission so long as the use is fair. The Supreme Court of Canada has already ruled that Canada’s fair dealing provision must be interpreted in a broad and liberal manner.<sup>6</sup> Yet the law currently includes a limited number of categories (research, private study, criticism, news reporting, and review) that renders many everyday activities illegal. The ideal remedy to address other categories such as parody, time shifting, and device shifting is to make the current list of categories illustrative rather than exhaustive. This can be best achieved by adding the words “such as” to the current provision. This would be a clean, technology-neutral approach.

In the event that specific new fair dealing exceptions are required (either directly within the statute or to provide guidance on the new flexible provision), key exceptions to address include:

1. Parody and Satire
2. Time Shifting

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<sup>4</sup> *Berne Convention for the Protection of Literary and Artistic Works*, Sept. 9, 1886; revised July 24, 1971 and amended 1979, 1 B.D.I.E.L. 715 [*Berne Convention*].

<sup>5</sup> *WIPO Copyright Treaty*, 20 December 1996, 36 ILM 65 ; *WIPO Performances and Phonograms Treaty*, 20 December 1996, 36 I.L.M. 76.

<sup>6</sup> *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 S.C.R. 339 [*CCH Canadian Ltd.*].

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3. Format Shifting
  4. Music Shifting
  5. Teaching

## 2. THE ANTI-CIRCUMVENTION PROVISIONS

*Anti-circumvention provisions must be directly linked to copyright infringement.*

The anti-circumvention provisions have been by far the most controversial element of recent attempts at Canadian copyright reform. The experience in the United States, where anti-circumvention provisions effectively trump fair use rights, provides the paradigm example of what not to do. It should only be a violation of the law to circumvent a technological protection measure (“TPM”) if the underlying purpose is to infringe copyright. Circumvention should be permitted to access a work for fair dealing, private copying, or any other legal purposes. This approach – which is similar (though not identical) to the failed Bill C-60 – would allow Canada to implement the World Intellectual Property Organization’s Internet treaties and avoid some of the negative “unintended consequences” that have arisen under the DMCA.

The need for the link between anti-circumvention for the purpose of copyright infringement is crucial since to do otherwise goes far beyond what is needed to comply with the WIPO Internet treaties and ultimately has the effect of eviscerating fair dealing in the digital environment.

Indeed, using a C-61 style approach to anti-circumvention necessitates a myriad of exceptions. These include exceptions for:

- Circumvention of cell phone locks
- Fair Dealing
- Court cases, laws, and government documents
- Personal uses
- Digital archiving
- Teaching
- Protection of Minors
- Software filtering programs
- Obsolete or broken digital locks
- Non-infringing access

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- Research
  - Interoperability
  - Privacy
  - Perceptual disabilities

Many of these exceptions were missing from Bill C-61.<sup>7</sup> Should the government decide to re-introduce Bill C-61, exception-based approach to anti-circumvention, these additional exceptions should be included.

*No ban on devices that can be used to circumvent a TPM, provided that it has non-infringing uses.*

Canada should not ban devices that can be used to circumvent a TPM. The reason is obvious – if Canadians cannot access the tools necessary to exercise their user rights under the *Copyright Act*,<sup>8</sup> those rights are effectively extinguished. If organizations are permitted to use TPMs to lock down content that threatens fair dealing, Canadians should have the right to access and use technologies that restore the copyright balance.

From a WIPO ratification perspective, there is no requirement for this provision. Indeed, Bill C-60 provided a model that did not touch devices themselves, choosing instead to target conduct involving circumvention for the purposes of copyright infringement.<sup>9</sup> By removing the unnecessary ban on devices that can be used to circumvent, there is a greater likelihood that Canadians would have access to programs that could be used to retain their existing rights and protect their privacy.

*Create authorized circumventers*

The removal of the provisions that target the legality of circumvention devices is one way to help ensure that the law does not eliminate basic copyright user rights. There are other approaches, however, that can be introduced in tandem with that change. New Zealand's recent copyright law reforms introduced the concept of

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<sup>7</sup> Bill C-61, *supra* note 2.

<sup>8</sup> *Copyright Act*, R.S.C., 1985, c. C-42 [*Copyright Act*].

<sup>9</sup> [Bill C-60](#), *An Act to Amend the Copyright Act*, 1st Sess., 38th Parl., 2005.

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"qualified circumventers."<sup>10</sup> The law grants special rights to trusted third parties who are permitted to circumvent on behalf of other users who are entitled to circumvent but technically unable to do so. The current list of qualified circumventers includes librarians, archivists, and educational institutions. This approach rightly recognizes that many people will be unable to effectively use the exceptions inserted into the law. By creating a class of trusted circumventers, the law creates at least one mechanism to ensure that users retain their existing copyright rights.

*Establish a Positive Requirement to Unlock for Exceptions/Right of Access*

Many countries have recognized the danger that combination of DRM and anti-circumvention legislation may effectively eliminate user rights or copyright exceptions in the digital environment. Creating exceptions is one way to address the issue, but another is to adopt an approach of "with rights come responsibilities." In this case, if companies obtain new legal rights for DRM, they must also shoulder the responsibility of unlocking their content when requested to do so by users for legal purposes. This is a common theme in copyright laws around the world, which often identify courts, tribunals or mediators as the source to ensure that rights holders do not use DRM to eliminate user rights.

3. THE INTERMEDIARY PROVISIONS

*Establish a legal safe harbour for Internet intermediaries supported by a "notice and notice" takedown system*

The creation of a legal safe harbour that protects Internet intermediaries from liability for the actions of their users is critically important to foster a robust and vibrant online world. Indeed, without such protections, intermediaries (which include Internet service providers, search engines, video sites, blog hosts, and individual bloggers) frequently remove legitimate content in the face of legal threats. Canadian law should include an explicit safe harbour that insulates intermediaries from liability where they follow a prescribed model that balances the interests of users and content

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<sup>10</sup> *Copyright (New Technologies) Amendment Act 2008* (N.Z.), 2008/27, Section 226E.

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owners. The ideal Canadian model would be a “notice and notice” system that has been used successfully for many years on an informal basis.

*Establish a Useful Provision for ILTs*

The inclusion of "Information Location Tool Providers" (ie. search engines) provisions in Bill C-61 was a bit of a surprise. By far the most problematic aspect of the ILT provisions was the creation of a notice-and-takedown system for search engines. Unlike ISPs - who were subject to the more-balanced notice-and-notice approach - ILTs were effectively subject to a notice-and-takedown system without any of the counter-notification or balancing provisions contained in the U.S. DMCA.<sup>11</sup> Bill C-61 created a parallel notice and takedown system for ILTs since section 41.27(2)(f) limited the availability of the safe harbour to instances where no notification of copyright infringement has been received.<sup>12</sup> This would have effectively forced ILTs to remove content upon notification since failure to do so risked potential liability.

While a notice-and-takedown approach for ILTs was bad enough, it was made worse by the absence of any balancing provisions. For example, the U.S. DMCA includes a "counter-notification" provision that allows for the re-posting of content that has been taken down.<sup>13</sup> There was no such provision in C-61, meaning that the ILT provisions were ripe for abuse. There are benefits to creating an ILT safe harbour, but they should not incorporate a notice-and-takedown requirement.

*Reject A Three-Strikes and You're Out System*

Several countries have begun to consider establishing a “three-strikes and you’re out system” that removes Internet access based on unproven allegations of infringement.<sup>14</sup> Attempts at three-strikes

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<sup>11</sup> DMCA, *supra* note 3.

<sup>12</sup> Bill C-61, *supra* note 2.

<sup>13</sup> DMCA, *supra* note 3.

<sup>14</sup> See e.g.: “France’s HADOPI 2 Passes”, *Intellectual Property Watch* (15 September 2009), online: <<http://www.ip-watch.org/weblog/2009/09/15/frances-hadopi-2-passes-again/>>; Mark Hefflinger, “South Korea Adopts "Three-Strikes" Law on File-Sharing”, *Digital Media Wire* (16 April 2009), online:

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systems have struck out in virtually every country where they have been raised.<sup>15</sup> Internet access is far too important to establish a system that would cut off access based on unproven allegations of infringement. The proposals raise a host of due process and constitutional concerns and should be rejected as a possible alternative for Canada.

#### 4. MODERNIZE THE LAW

##### *Modernize the backup copy provision*

As part of a major set of copyright reforms in 1988, Canadian copyright law was amended to allow for the making of backup copies of computer programs. In 1988, backing up digital data meant backing up software programs. Today, digital data includes CDs, DVDs, and video games. All of these products suffer from the same frailties as software programs, namely the ease with which hard drives become corrupted or CDs and DVDs scratched and non-functional. From a policy perspective, the issue is the same - ensuring that consumers have a simple way to protect their investment. "Modernizing" copyright law should include bringing this provision into the 21st century by expanding the right to make a backup copy to all digital consumer products.

##### *Rationalize the Statutory Damages Provision*

Canada is one of the only countries in the world to have a statutory damages provision. It creates the prospect of massive liability – up to \$20,000 per infringement – without any evidence of actual loss.<sup>16</sup> This system may have been designed for commercial-

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<<http://www.dmwmedia.com/news/2009/04/16/south-korea-adopts-%2526quot%3Bthree-strikes%2526quot%3B-law-file-sharing>>.

<sup>15</sup> See, e.g., Marisa Taylor, "New Zealand Reconsiders Three-Strikes Rule on Internet Use" *Wall Street Journal*, (26 March 2009), online: <<http://blogs.wsj.com/digits/2009/03/26/new-zealand-reconsiders-three-strikes-rule-on-internet-use/>>; Howell Llewellyn, "'Three-Strikes' Off Anti-Piracy Agenda In Spain" *Billboard.biz* (22 June 2009), online: <[http://www.billboard.biz/bbbiz/content\\_display/industry/e3i8071e0d9c25cb6b862b9ad47dcda751d](http://www.billboard.biz/bbbiz/content_display/industry/e3i8071e0d9c25cb6b862b9ad47dcda751d)>; Jacqui Cheng, "Germany says 'nein' to three-strikes infringement plan" *Ars Technica* (6 February 2009) online: <<http://arstechnica.com/tech-policy/news/2009/02/germany-walks-away-from-three-strikes-internet-policy.ars>>.

<sup>16</sup> *Copyright Act*, *supra* note 8.

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scale infringement, but its primary use today is found in the U.S. where statutory damages led to the massive liability for several peer-to-peer file sharing defendants and leaves many with little option but onerous settlement. Before Canada faces similar developments, we should amend the statutory damages provision by clarifying that it only applies in cases of commercial gain. Moreover, the provision should not apply where the infringer had a good faith belief that the alleged infringement was fair dealing.

## 5. ENHANCE THE PUBLIC DOMAIN

### *Do not harm the public domain with copyright term extension*

While some countries have extended the term of copyright beyond the Berne Convention requirement of life of the author plus 50 years,<sup>17</sup> there is no compelling reason – either from an economic, creativity, or innovation perspective – to extend the term. Indeed, there are strong arguments that harming the public domain would have the opposite effect. The government should make a clear commitment not to extend any further. Moreover, it should identify a presumed public domain date (based on birth date and reasonable life expectancy) to facilitate digitization of Canadian heritage.

### *Abolish Crown Copyright*

Dating back to the 1700s, Crown copyright reflects a centuries-old perspective that the government ought to control the public's ability to use official documents. Today Crown copyright extends for fifty years from creation and it requires anyone who wants to use or republish a government report, parliamentary hearing, or other work to first seek permission. While permission is often granted, it is not automatic. The Canadian approach stands in sharp contrast to the situation in the U.S. where the federal government does not hold copyright over work created by an officer or employee as part of that person's official duties. Government reports, court cases, and Congressional transcripts can therefore be freely used and published.

The existence of Crown copyright affects both the print and audio-visual worlds and is increasingly viewed as a barrier to

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<sup>17</sup> *Berne Convention*, *supra* note 4.

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Canadian film making, political advocacy, and educational publishing. Beyond the policy reasons for abandoning Crown copyright, there are financial reasons for reforms. The federal Crown copyright system costs taxpayers hundreds of thousands of dollars. Documents from Public Works and Government Services Canada, which administers the Crown copyright system, reveal that in the 2006-7 fiscal year, Crown copyright licensing generated less than \$7,000 in revenue, yet the system cost over \$200,000 to administer.<sup>18</sup> In most instances, Canadians obtain little return for this investment. Ninety-five percent of Crown copyright requests are approved,<sup>19</sup> with requests ranging from archival photos to copies of the *Copyright Act*.<sup>20</sup>

Given the significant costs associated with a program that does more harm than good, any new copyright reform should eliminate Crown copyright and adopt in its place a presumption that government materials belong to the public domain to be freely used without prior permission or compensation.

#### 6. EFFECTIVE LIBRARY AND EDUCATION PROVISIONS

##### *Do Not Implement An Internet Exception for Education*

One of the most controversial aspects of Bill C-61 was the inclusion of a special educational Internet exception.<sup>21</sup> The provision split the education community, generating support from some education groups and opposition from others. I do not believe that the exception is either necessary or equitable. The law already permits many educational uses of Internet materials without compensation. The educational Internet exception should be dropped in favour of a more flexible fair dealing provision discussed above that treats educators, creators, and all Canadians in an equitable manner.

In fact, the Internet exception was more than just unnecessary - it was harmful. First, rather than improving access, the exception would have encouraged people to take content offline or to erect barriers that limit access (including DRM). Many website owners

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<sup>18</sup> Michael Geist, "Crown copyright is overdue for retirement" *Toronto Star* (12 May 2008), online: < <http://www.thestar.com/article/424333>>. [Geist, "Crown Copyright"]

<sup>19</sup> *Ibid.*

<sup>20</sup> *Copyright Act*, *supra* note 8.

<sup>21</sup> *Bill C-61*, *supra* note 2.

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who may be entirely comfortable with non-commercial or limited educational use of their materials, may object to a new law that grants the education community unfettered (and uncompensated) usage rights. Accordingly, many sites may opt out of the exception by making their work unavailable to everyone. This is obviously a lose-lose scenario that arises directly out of the exception.

Second, the implication of the exception was that using publicly-available Internet materials is not permitted unless one has prior authorization or qualifies for the exception. This suggests that millions of Canadians outside the education system who use Internet-based materials are somehow violating the law. This is simply wrong - an enormous amount of online content is intended for public use or qualifies as fair dealing - and to imply otherwise sends the wrong message. Indeed, many of the concerns expressed by the education community apply equally to other groups who do not qualify for the exception. Third, the exception may have violated international law. There are doubts that the provision complied with Canada's existing obligations under the Berne Convention,<sup>22</sup> the world's foremost international copyright treaty. Given that the exception raised these real harms, it should be scrapped by moving toward a flexible fair dealing provision.

#### *Library Provisions Should Rely on Fair Dealing*

E-reserves are the electronic equivalent of the traditional library book reserves - books or materials that a professor places on reserve in the library so that it is accessible to the entire class. In the aftermath of the *CCH Canadian Ltd. v. Law Society of Upper Canada* Supreme Court of Canada decision<sup>23</sup>, a growing number of universities began to establish (or consider establishing) e-reserve policies based on fair dealing. Most libraries had traditionally sought licenses for the use of electronic copies of these additional research and reading materials, yet the frustration of lengthy delays and the *CCH* case spurred many to think about a fair dealing based approach. For example, the University of Calgary has established an e-reserve

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<sup>22</sup> *Berne Convention*, *supra* note 4.

<sup>23</sup> *CCH Canadian Ltd.*, *supra* note 6.

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policy<sup>24</sup> that links to accessible online content and scans print material that qualifies as fair dealing. The move toward fair dealing based e-reserve policies has been gaining momentum in Canada, yet Bill C-61 tried to steer libraries in a different direction as the bill includes a specific provision that promotes a license-based approach.<sup>25</sup> New legislation should reverse that course by emphasizing the benefits of a fair dealing model.

## 7. CONTRACT AND COPYRIGHT

The use of contractual terms to effectively void privacy protection or basic copyright user rights has become all too common with cases such as the Sony rootkit<sup>26</sup> providing a classic example of how contractual terms that quash important legal rights are buried beneath the "I agree" button.

Governments are understandably loath to intervene in privately negotiated contracts. However, not every contract or contractual term is enforceable - there are certain terms (and certain contracts) which run counter to important public policy goals that will often be rendered unenforceable by a sympathetic court. On this particular issue, we should not wait for the courts to intervene. Rather, Canada should identify the core protections and policies that underlie the copyright balance and establish rules that prohibit attempts to "contract out" of such terms.

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<sup>24</sup> University of Calgary, "E-Reserve Policy" Online: < <http://library.ucalgary.ca/services/faculty/placing-reserve-readings/ereserves> >.

<sup>25</sup> Bill C-61, *supra* note 2.

<sup>26</sup> Michael Geist, "Sony's long-term rootkit CD woes" *BBC Online* (21 November 2005), online: < <http://news.bbc.co.uk/2/hi/technology/4456970.stm> >.