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Copyright Consultations Submissions

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COPYRIGHT CONSULTATIONS SUBMISSION*

David Allsebrook[†]

This submission details the reforms that the author believes are necessary in order to “rationalize” the Copyright Act. It attempts to answer five questions which have been posed by the Ministers of Industry and Heritage in connection with the public consultation on the need to “modernize” the Copyright Act. The author is concerned that the ‘modernization’ that is called for may simply serve to protect powerful interest groups such as the MPAA. A variety of reforms are suggested, including: protection from any form of government censorship; a functional definition of ‘works’ which focuses on originality, self-expression and fixation; minimum benefit guarantees for users; an extension of the blank storage device levy; streamlining the acquisition and use of works commissioned for commercial purposes; and the recognition of the right to create and publish works of parody. The author concludes by noting that the whole point of copyright is to obtain the widest access to published works.

SUMMARY

The author recommends that Canada amend the *Copyright Act*[‡] to:

* © 2009 David Allsebrook. The author would like to thank Greg Ludlow and Professor Michael Geist for their insights and comments on an earlier draft; however any errors or omissions remain solely the fault of Microsoft Word. This paper is a revised version of David Allsebrook’s Copyright Consultations submission of August 10, 2009.

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[‡] *Copyright Act*, R.S.C., 1985, c. C-42, as amended. [*Copyright Act*]. Unless stated otherwise, all references to an “Act” are to the *Copyright Act*.

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- Restrict the powers of the Copyright Board, and the interpretation of the *Copyright Act*, to ensure that the Act shall not be applied or construed to involve the government, directly or indirectly, in restricting access to legal copies of published works² or committing other acts of censorship.
 - Define the protected works exclusively by the properties which it seeks to encourage, namely, originality, self-expression and fixation.
 - Affirmatively and clearly state the minimum benefits from copyright protected creations, to which the public is entitled under the Act.
 - Extend the benefits of the *Copyright Act* only to works whose owners permit the public to enjoy the minimum benefits. Suspend or eliminate all *Copyright Act* protections in a work, if the copyright owner (or anyone deriving benefits from the rights in the work through the owner), acts to limit these benefits. Acts of limitation should include those caused by restrictive license terms, technical protection means, or abuse through collective administration.
 - Extend the successful current single copy exemption and blank storage media levy scheme for the private use of sound recordings, to all digital works. It is a much better solution than trying to stop the unstoppable copying of DVDs and other digital media, and compensates the copyright owners.
 - Require that all blank media packages for which a levy is being collected, or a notice posted at their place of sale, be conspicuously marked a) that a levy of a required amount is collected from purchasers and remitted to copyright owners, and b) listing users' rights to make copies. These facts are unknown to the public.
 - Excuse those who use blank storage media exclusively for licensed works, or their own works, from paying the levy, as Australia does.

² References in this paper to "works" are to all forms of expression protected or protectable by copyright, and not merely those currently defined as "works" in the *Copyright Act*.

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- Make the person who commissions any work the first owner of copyright, unless the contrary is expressly stipulated in writing at the time of commissioning.
 - Exclude from moral rights protection, works commissioned for business purposes, such as trade marks, jingles, theme songs, packaging and advertising, unless otherwise stipulated in writing at the time of commissioning.
 - Fix the term of copyright to a set number of years, without regard to the date of death of the author.
 - Eliminate the right of reversion altogether, at least for works commissioned for business purposes.
 - Remove "and to authorize any such acts" from the Act (ss. 5(1)), or define it. It is unclear, uncertain in scope, seldom applied but always pleaded, tempts fate in the form of attracting undesired and inconsistent interpretations, and is not needed because contributory and conspiratorial torts are already dealt with by the common and civil laws.
 - Expand the functional use exclusion in s. 64.1 to include copying and using computer object code on a digital computer, and any other functional item which may have embedded copyright material, except while any patent pertaining to it is in force.
 - Set the copyright collectives' obligations to pay out their royalties collected, so that they cannot continue to defer payouts indefinitely and keep for their own benefit amounts vastly in excess of their expenses and capital requirements.
 - Add "parody" as an exception to copyright and moral rights infringement.

No Action

No action should be taken to increase legal protection of digital copy protection schemes or otherwise restrict access to copyright works, ever. It is government censorship and entirely unacceptable. It is also unnecessary. There is also no need to increase the penalties for copyright infringement, at the present time. The technology involved is changing rapidly, as are the marketing models

of the rights holders, and the tastes and expectations of consumers. The marketplace will arrive at a much more efficient and mutually acceptable solution if left alone. There is no current shortfall in the supply or consumption of digital works, which are the only events which would justify legislative intervention during a time of rapidly changing circumstances.

Action

Action should, however, be taken to resolve three long term practical problems in the Act. First, the lack of clarity of purpose, resulting in inconsistent and sometimes overly harsh punishments; second, the poorly integrated introduction to the Act of the protection of functional works, namely computer software; and thirdly, simplifications to reduce the transaction costs to all parties of dealing with original works for commercial purposes.

The real issue in the current wave of copyright reforms is not how do we provide an incentive to create or consume original digital works, or how much is a fair return for such creation, as both of these thresholds have been crossed. The issue is: How much leverage mostly foreign digital copyright owners will be provided by Parliament to extract additional profits from the Canadian public?

The following five questions have been posed by the Ministers of Industry, and of Canadian Heritage and Official Languages, in connection with their public consultation on the need to "modernize" the *Copyright Act*.

1. How do Canada's copyright laws affect you? How should existing laws be modernized?
2. Based on Canadian values and interests, how should copyright changes be made in order to withstand the test of time?
3. What sorts of copyright changes do you believe would best foster innovation and creativity in Canada?
4. What sorts of copyright changes do you believe would best foster competition and investment in Canada?
5. What kinds of changes would best position Canada as a leader in the global, digital economy?

1. HOW DO CANADA'S COPYRIGHT LAWS AFFECT YOU? HOW SHOULD EXISTING LAWS BE MODERNIZED?

Canada's copyright laws affect me in five basic ways:

1. The proposed introduction into copyright law of censorship, by governmentally enforced restrictions on public access to published works, is anathema to me. Any civilized government's principle job is to defend and protect the rule of law, and all of the civil rights it makes possible. The few instances justifying limiting civil rights are only acceptable as a very last resort. Adjusting the balance of power between competing economic interest groups, as the *Copyright Act* does, is very far from being a crisis which justifies government censorship.
2. As a consumer of copyright works, such as music, television, literature, non-fiction texts, periodicals, software(including freeware, shareware and open source), and Internet content. In these contexts, copyright costs me money, directly and indirectly, as a cost to the businesses with which I deal. I resent and am cheated by limitations on the ability to use the works I have legally acquired as I see fit, and I deplore the limitations on the benefits to society which copyright law is supposed to provide. The extent to which copyright has enabled or enhanced these products and services is unknowable.
3. As a creator of works such as legal opinions and myriad other legal documents, articles, literary works, computer software, photographs, blueprints and technical and artistic sketches and drawings. In these contexts the incentive of copyright has not been a factor and the commercial returns negligible if not nil.
4. I am an expert copyright lawyer with 23 years of experience advising and litigating for virtually every type of participant in the copyright system. I have often lectured and published on copyright and related legal issues.

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5. As a Canadian citizen, I am very concerned that my government is negotiating an apparently draconian trade agreement called "ACTA" in secret. There is no justification for this in a democratic society. Canadian intellectual property lawyers are second to none. We would be delighted to advise whether an agreement is needed, and to help draft one if it is. The provisions of Bill C-61³ were embarrassing and harmful, and look like our negotiators have been taken to the cleaners. Perhaps that is the reason for the secrecy with ACTA.

The question of how to modernize our copyright laws assumes that "modernization" is required. The question will only encourage interest groups to state how the Act should be changed to favour their interest, under the cloak of "modernization". Politically the question gives cover to any move Parliament makes to amend the Act, because "modernization" is a 'motherhood' word. Who could oppose "modernization"?

Me, as it turns out. Our copyright laws do not need to be "modernized", at least in any sense requiring new prohibitions or remedies for infringement. Instead, the *Copyright Act* should be rationalized. It would be much easier to use if it were redrafted to operate on its underlying timeless principles, rather than as it does now by reference to constantly changing technologies and markets. The other Canadian intellectual property statutes operate very well using this drafting philosophy. My answer to the next question explains how and why to revise the Act to accomplish this.

Why Increasing the Penalties for Copyright Infringement is Futile

Several recent bills have proposed to stiffen criminal and civil penalties for copyright infringement and criminalize the possession and use of means of defeating technical protection means (TPM) applied to copyright works.

The problem with enforcing copyright by criminal prosecution is not that the offences are ill-defined or that the penalties are inadequate. It is that the burden of proof is hard to meet,

³ [Bill C-61](#), *An Act to Amend the Copyright Act*, 2nd Sess., 39th Parl., 2007-2008 [Bill C-61].

and it is often too risky to try, because a failed prosecution is an "all clear" signal to large scale illegal copiers. To prove the existence of copyright, it can be necessary to produce the original authors and creators of the work as witnesses. They have better things to do. The copyright also lasts for fifty years after they die, an event which makes their evidence even less obtainable.

A criminal conviction also would not remunerate the copyright holders for their losses or the expenses of assisting the prosecution. This is why copyright owners of works of enormous commercial value often pay lip service to cooperating with law enforcement authorities, while seldom proving their rights beyond the interlocutory stage in the civil Courts or in the criminal Courts.

The most strident lobbying organization seeking increased criminal protection for its works is the Motion Picture Association of America (MPAA).⁴ The MPAA is trying to manoeuvre Canada and all other countries into enforcing its members' rights for them, at the countries' expense. MPAA members have no intention of seeking criminal prosecution for copyright infringement of their movies in Canada.

The MPAA's strategy can be simply demonstrated. In order to prove criminal copyright infringement in Canada, the first step is to file in evidence a Canadian copyright registration, because it substitutes for expensive witnesses as proof of the existence and ownership of copyright, unless there is a reason to question its veracity. However, to be admissible the copyright must have been registered in Canada before the infringement took place. The ten top-grossing movies of 2009, as of the end of July, were all produced by members of the MPAA. Only three of the ten movies' copyrights were registered in Canada by that time. The registration fee is \$50.00, and registration may be done very simply, and online, from anywhere in the world.

The lack of registration is particularly telling since the MPAA believes that 90 percent of piracy committed against it comes from copies of movies made by videotaping a showing of the movie in a

⁴ As any experienced negotiator can tell you, the shrillest bargainer has the weakest argument.

cinema.⁵ The most damaging piracy takes place at the beginning of the film's release, when the infringing copies can circulate around the world electronically long before the film is exhibited or authorized copies released internationally. The MPAA members have not taken the most basic step towards stopping this activity in Canadian Courts.

The U.S. government, motivated by the MPAA, and by its own negative balance of payments, wants Canada to authorize Customs officials (the Canada Border Services Agency) to seize counterfeit works, criminalize the circumvention of TPM, limit access to copyright works, and increase the penalties for copyright infringement and piracy. None of these measures will cost the MPAA members any time or effort. They all shift the burden of protecting the MPAA members' copyrights from them, to the Canadian taxpayers.

The U.S. Government even wants Canadian customs officers to inspect individuals' personal electronic devices for infringing copies of U.S. originated copyright works. This is would be enormously expensive in wasted time. It would be ineffective because of the difficulty in differentiating between legal and illegal copies (especially given that the two are identical). It would divert customs officials from their other duties, such as keeping terrorists, illegal drugs, nuclear weapons, etc. from crossing the border.

Let us consider one MPAA-inspired new remedy Canada is being asked to adopt, namely, the demand that Customs be permitted to seize infringing goods. Customs already does this.

Customs and police seizures happen in this way: Customs and the police, particularly the RCMP (Royal Canadian Mounted Police), are already alert for counterfeit goods. When Customs finds suspicious goods, they promptly contact RCMP. The RCMP promptly contacts the counsel for the intellectual property rights owners, such as myself. Customs holds the goods until a rights owners' representative has had a reasonable chance to inspect them. Then, if the shipment is

⁵ "Many countries also need to enact stronger laws against illegal video recording", said Richard Cook, the chairman of Walt Disney Studios. "More than 90 percent of the counterfeit versions of movies recently released to DVD can be traced back to illegal video recording", Cook said. As high-definition camcorders become more easily available and more affordable, he said he expects the problem to increase. Stephanie Condon, "Congress Looks Abroad to Curb Piracy" *CNET News* (April 6, 2009), online: < http://news.cnet.com/8301-13578_3-10213367-38.html>.

determined to be counterfeit, the rights owner can get a civil Court order to seize it, and Customs continues to hold it while that order is obtained and executed.

No new mechanism for Customs seizures is either required or desirable. There is already an effective remedy for intercepting the flow of counterfeit goods. It is a fair one, because it puts some of the expense and burden on the rights holders. It lets the rights holders determine whether the goods are counterfeit (they are in the best position to know), whether to bother seizing them, and what to do with them, rather than imposing those burdens and risks on Customs. This early and efficient involvement of the rights owner is particularly fair, given that goods which infringe copyright are to be dealt with as if they were the property of the copyright owner.⁶ So if Customs simply destroyed counterfeit goods, for example, rather than store them at public expense, the copyright owner may feel aggrieved.

The advantages to the MPAA of Canada permitting direct Customs seizures are fourfold. They shift the costs to the public. They allow the MPAA to blame Customs for any errors or omissions. They allow MPAA to demonstrate to its members' Canadian distributors that it has obtained protection for them, while sparing its members from expense. Any shipment which is mistaken by Customs for counterfeit goods is not the MPAA's problem, because the legitimate owner of the goods will have to go to the trouble, delay and expense of retrieving their legitimate goods from Customs, without any recourse to the MPAA or its members. All of these advantages to the MPAA are disadvantages to the Canadian public, and would actually diminish the standard of border protection for counterfeit goods.

2. BASED ON CANADIAN VALUES AND INTERESTS, HOW SHOULD COPYRIGHT CHANGES BE MADE IN ORDER TO WITHSTAND THE TEST OF TIME?

Why the Copyright Act as presently drafted needs constant revision

Copyright law should change as fast as the rules of chess.

⁶ *Copyright Act*, *supra* note 1, s. 38(1).

The *Copyright Act* has a very cumbersome method of describing the works it protects. The master definition lists the four fields of endeavour in which it protects original works; literary, dramatic, musical and artistic.⁷ Then it defines them collectively: "Every original literary, dramatic, musical and artistic work includes every original production in the literary, scientific or artistic domain..."⁸ [where did science suddenly come from, and what happened to music and drama? A term being defined, "literary", is included in the definition, an unhelpful practice, which happens again in the definition of "literary works".]⁹ Although the Act deals with works of expression, the word "production"¹⁰ is used where "expression" ought to be (and "production" is nowhere defined). The same definition continues on, to assure us that the form of fixation of the expression does not matter "...whatever may be the mode or form of its expression..." [surely the words "production" and "expression" are reversed] and then by way of legal overkill gives some examples "...such as compilations, books, pamphlets and other writings, lectures, dramatic or dramatico-musical works, musical works, translations, illustrations, sketches and plastic works...". But even after all that the drafter could not leave well enough alone. The definition goes on. It qualifies the examples it just gave, by limiting them to four fields of endeavour, of which three have not been previously mentioned. "...relative to geography, topography, architecture or science" [So does the Act protect all dramatico-musical works, or only those pertaining to geography, topography, architecture or science? And why is there no mention of animal husbandry, coin collecting or taxidermy?]

We are far from done with the complexity of the definitions of protected works. The terms "Literary, dramatic, musical and artistic", having been defined collectively as described above, are also each individually defined, again inclusively, by giving lists of items

⁷ "every original literary, dramatic, musical and artistic work" includes every original production in the literary, scientific or artistic domain, whatever may be the mode or form of its expression, such as compilations, books, pamphlets and other writings, lectures, dramatic or dramatico-musical works, musical works, translations, illustrations, sketches and plastic works relative to geography, topography, architecture or science"; *Copyright Act, supra* note 1, s.2.

⁸ *Ibid*, s. 5(1).

⁹ *Ibid*, s. 2.

¹⁰ *Ibid*.

which are deemed to fall in each category.¹¹ Defining terms twice is a formula for confusion. Many of the listed items are further defined and qualified. I could go on to illustrate the further layers and complications, but there are limits to patience.

The point is, that our current definition of the key term, "works", takes a very long and confusing route to say what could be said more clearly, concisely, and enduringly. Before I suggest how to do that, two other weaknesses of the existing definition need to be mentioned. First, because of its habit of listing each type of work it covers, the definitions have to be constantly amended when a new type of work arises or an old one fades away. So the first part of the answer to the question as to how the Act can be made to stand the test of time, is to stop using a form of definition which requires constant amendment. By replacing the existing definition, all of its charmingly quaint and mystifying intricacies can be eliminated.

The second point, before we get to a new definition of "works", arises from the cross-threading of the Act caused by the introduction of "Computer program" into the definition of "literary work".¹² Computer programs are defined to include their functional form,¹³ often known as "object code", and in that form, they are the only kind of work protected by the Act whose functionality goes beyond performing the embodied work itself.

Okay, now let's try defining "works", which are what are protected by the *Copyright Act*. According to the Supreme Court of Canada, "the purpose of copyright law was to balance the public interest in promoting the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator".¹⁴ Let us define "works" as "non-functional and original fixed forms of self-expression". Using that definition the Act will serve as its own

¹¹ *Ibid.*

¹² "literary work" includes tables, computer programs, and compilations of literary works"; *Copyright Act, supra* note 1, s.2.

¹³ "computer program" means a set of instructions or statements, expressed, fixed, embodied or stored in any manner, that is to be used directly or indirectly in a computer in order to bring about a specific result"; *Copyright Act, supra* note 1, s.2.

¹⁴ Most recently in *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 S.C.R. 339 at para. 24, per McLachlin CJC. [*CCH Canadian Ltd.*].

guide to what is protected, just as the Patent Act captures all forms of "new, useful and non-obvious" inventions.¹⁵

The problem of the presence of functional computer object code in the Act is addressed in answer to Question 3.

Completing the principles of a self-adjusting Copyright Act

As stated above, the works protected by the act should be defined by the qualities we seek to encourage, namely originality, self-expression and fixation in a permanent medium. Apart from quibbles such as whether a quantum state, or a block of dry ice, is fixed, the emergence of new media and types of self-expression will be accommodated automatically, and any disputes resolved by the Courts, as guided by our treaty commitments.

The *Copyright Act* should state clearly and affirmatively the exclusive rights owners and creators of protected works enjoy. Equally, the Act should state affirmatively, in equally principled terms, the minimum rights the public has in respect of each published work.¹⁶ For many reasons, such as to ensure that the Act is interpreted and applied fairly, and that the public sees copyright and neighbouring rights as a fair exchange and not an oppressive and arbitrary imposition, the bargain underlying the existence of copyright must be clearly stated and be enforceable. To accomplish this, the Act must state that fettering or abusing any of the minimum rights of the public in respect of a published work by an interested party, operates to suspend or extinguish copyright, and all other forms of civil and criminal protection under the *Copyright Act*, in respect of that work.

By "fettering" the rights of copyright users, I include TPMs, to the extent that they prevent legitimate uses of copyright works or

¹⁵ Except those which alarm the Supreme Court: *Harvard College v. Canada (Commissioner of Patents)*, 2002 SCC 76, [2002] 4 S.C.R. 45, (2002), 219 D.L.R. (4th) 577 (A majority of the Court refused to hold that a mouse was a "composition of matter").

¹⁶ These are found in various parts of the Act, such as sections 6–9, 29–30.9, 64.1, and 80.

cause damage to users' equipment and data.¹⁷ Obviously, seeking to limit users' rights by contract would attract the same sanctions.¹⁸ This creates the possibility that rights owners may opt out of *Copyright Act* protection. Similarly, many inventors opt not to seek patents of invention, but rely instead on secrecy or contractual arrangements to serve their interests.

Fairness to all interest groups, as well as the operation of a purposive self-adjusting *Copyright Act*, requires the creation of an unqualified "fair dealing" clause. This is long overdue. The Courts must have discretion to excuse violations of the rights given by the Act when fairness compels it. Specific exceptions may serve as examples of "fair dealing" but should not be an exhaustive list. This will give the Act the flexibility it needs to deal with individual situations and evolving changes in technology and circumstances, without the need for continual legislative intervention. It will also enhance public confidence in the Act and public respect for creators. It will encourage Courts to apply the Act in a fair-minded way, by balancing interests, rather than the formulaic and punitive attitude which currently prevails in the interpretation of the Act.¹⁹

Creating a "balanced" Act and a fair-minded application of it also requires the removal of minimum damages clauses, and the notion that damages must be extreme to deter infringers. Damages must be assessed fairly, without the thumb of statutory malice on the scales.

¹⁷ A recent notorious example was Sony's surreptitious installation of a "root-kit" on the hard drives of computers playing certain of its CDs. The Sony software diminished the functionality of the computers it ran on, and caused damage to the computers when even expert users tried to remove it. Sony included the software on 102 music CDs, in at least some cases without the knowledge of the musicians: Molly Wood, "[DRM this, Sony!](http://www.cnet.com/4520-6033_1-6376177-1.html)" *CNET News* (November 3, 2005), online: http://www.cnet.com/4520-6033_1-6376177-1.html.

¹⁸ This takes us back to functional concerns, such as license terms which prohibit de-compilation of object code, as well as contracts which require confidentiality in respect of the contents or workings of published works, or which limit the right to share or sell a legal copy of a published work.

¹⁹ E.g., "As well, exceptions to copyright infringement should be strictly interpreted.": *Compagnie Générale des Établissements Michelin-Michelin & Cie v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada)*, [1997] 2 F.C. 306, Teitelbaum, J. [CAW] (Why should exceptions be strictly interpreted if the Act is, as the Supreme Court tells us, a balance of interests?).

Parody

An example of Canada's overly rigorous and unsympathetic approach to interpreting the Act, is the Act's treatment of parodies.

In applying the Act, the Courts have condemned the creation of a parody of a copyright work as an infringement of the copyright.²⁰ This is a national embarrassment. First, it conflicts with the purpose of the Act, which is to encourage people to express themselves and to disseminate the expression embodied in the copyright work. Parody draws further attention to the original work and its message, and constitutes the creation and dissemination of a new and contrasting work. Nothing more exactly fulfills the purposes of the *Copyright Act*. It is unrealistic to require a satirist to get the consent of the author of the work being satirized. The creators of the original are protected by moral rights and libel laws, and they do not otherwise need to be, and indeed one would think that constitutionally they cannot be, protected from being made an object of fun through parodies of their works.

Canadians have a proud tradition of comedy. Comedians are one of our most visible exports. The fact that our own laws constrain works of comedic expression is ironic and mean-spirited.

Parody should be expressly added to the examples of "fair dealing" with a work which do not constitute infringement.

Creating an enduring and effective level of incentive to create

How should incentive to create and disseminate original works be built into the Act so as to "withstand the test of time"? The same way that this is done in other intellectual property statutes. The nature of intellectual property protection is to grant the same protection to every work, invention, design, etc., without inquiry into the relative merits of each. The degree of effective incentive to each individual or business is determined according to many variables, and the accumulated wealth varies enormously, but these variations are inherent in capitalism, and few of them justify tinkering with the generic incentives in the various intellectual property acts.

²⁰ *CAW*, *Supra* note 19; [Canwest v. Horizon](#), 2008 BCSC 1609 at para 14.

The only time the *Copyright Act* should be changed to affect the balance of power between users and owners, is when conditions have changed so much that the benefits to the public have been completely extinguished- either no new works of a particular kind are being created or disseminated, even though there is a need for them, or abundant works are being created and disseminated without any need for copyright protection. The latter is impossible to determine when copyright protection is in force.²¹

Applied to the present situation, there is no need to change the Act now to extend further protections for works reproduced in digital form. There is no shortage of digital works being created, or being distributed in Canada. Added leverage for an already thriving industry by protecting TPM would be unfair to the other industries not so favoured, and would create a gratuitous net outflow of cash from the country. Another way to express this, is that the "just reward"²² the Act is intended to provide, to encourage self-expression, can in practice only ever be presumed to exist. The presumption will be rebutted when a shortage of new works arises, even though demand for them exists.

We do not want to be free riders. We want to contribute realistic incentives to creators, not just in Canada, but in every country that that reciprocates by recognizing the copyrights of our creators. We already meet that standard.

Even if there were an argument that the digital rights industry is so marginal it needs additional incentives at this time (which even the U.S. is not arguing), the industry's distribution costs are dropping fast and their market access is expanding fast, and at public expense. Many countries, including Canada, are funding the extension of high speed Internet access throughout their territories with public money. The Internet is rapidly evolving as inventive minds find new uses for it, and as bandwidth expands to accommodate the transmission of more and larger files. Digital works producers are thereby already

²¹ When copyright protection was first extended to computer programs, the software industry was booming and producing at capacity. No realistic argument could be made that it needed copyright protection to encourage creation and dissemination of new software or that compensations were inadequate. A busy industry cannot credibly complain that its rewards are unjustly low. If they were unacceptably low, their production or distribution would cease.

²² *CCH Canadian Ltd.*, *supra* note 14 at para. 23.

being given further incentive to create and disseminate their works, at the expense of Canadian taxpayers. The producers' advantages over unauthorized copiers increase daily. Similar subsidies are not available to all other types of creators.

Copyright owners of digital works have free access to partially publicly funded means of distributing their works in Canada, with little or no variable cost per transmission. Digital copyright owners can and do compete with makers of individual copies by:

- the unsurpassable convenience of internet access to their works,
- the ability to make works available from the time of their creation,
- the ability to make works available on demand, quickly and reliably,
- the unsurpassed quality of their files,
- the currency of their files,
- the lack of commercial interruptions and other artifacts found in unofficial copies,
- the authenticity of their files,
- the ability to enhance and upgrade their works,
- the ability to present a complete and comprehensive library of works for consumers to choose from,
- the ability to obviate the need for consumers to buy, use and store recording media, and
- the ability to entice users to purchase more downloads and services.

Mailing CDs and DVDs is also very inexpensive and provides most of these marketing advantages as well.

"The Test of Time" — Why constant Copyright Act amendment is harmful

Constantly revising the *Copyright Act* is undesirable. Obviously Parliamentary time is valuable, and the need to frequently purchase new copyright textbooks is expensive and annoying. Two cabinet ministers are running around the country talking about

copyright during an epic economic downturn, an environmental crisis that threatens the future of our species, a health care crisis, and I shall stop there. The public's already tenuous knowledge of a constantly changing Act falls out of date. More importantly, the accumulated revisions are wearing down acceptance of copyright among the general public, as well as the business community, to the point where they have long since revolted.

Every time the Act is changed, opportunities for interest groups to press for their own changes arise. There is an imbalance in the effectiveness of the lobbying of interest groups, heavily favouring the well organized and better funded rights holder side. [Although copyright collectives are supposed to be regulated, a look at their financial statements shows vast cash reserves in addition to those allocated for paying royalties, which have vague or no justification provided by the boards.²³ The Balance Sheet of Access Canada has \$10.7 million in "Unrestricted net assets", which is 20 percent of its assets. Another \$2 million is "...internally restricted for contingencies." These funds are in addition to those set aside for distribution to rights holders.] Whatever the cause, each revision to the Act further qualifies the rights of copyright users and adds new categories of rights for creators. Any necessary or desirable exceptions or benefits for users are so heavily qualified as to be virtually useless. The Act becomes more mean-spirited and greedy with each amendment.

The public does not know what its rights are under the *Copyright Act*. I often ask non-IP people, including lawyers, whether it is an act of copyright infringement to make a single copy of a music CD for their own private use. I have yet to find anyone who knows that it is legal. I also find few people outside the blank media business who knows about the blank storage media levy.

This means that many, many Canadians are copying music despite their impression that they are breaking the law. Second, Canadians are paying a fee on blank storage media that is not being disclosed to them, which is at the least unfair, and at the most fraud. Third, Canadians who wish to comply with the law, feel obliged to pay iTunes and other licensed music providers for licenses they don't need and have already paid for through the levy. Fourth, the

²³ Cf. Access Canada, *Canadian Private Copying Collective Financial Highlights, 2007*, cited in Access Canada: *Annual Report, 2008*, at note 12.

copyright owners, who collect the levy, get headlines in Canada with their complaints about Canadian "pirates", furthering the impression of sound recording copiers that they are breaking the law, and no voice is raised to clarify the situation. The news stories usually do not explain what is legal and what is not, or the blank media levy. Also U.S. news stories are confusing as the differences between the U.S. and Canadian copyright regimes are not known here and are not explained in Canadian news reports of U.S. copyright news.

The whole point of the blank storage media levy, and of Access Copyright, was to recognize that people are going to copy when the technology makes copying easy and cheap, and to capitalize on the phenomenon instead of trying futilely to ban it. The blank storage media levy scheme has worked, and converted sinners into saints, at the expense of double charging the existing saints.

Summary

The text of the *Copyright Act* can withstand the test of time, by changing the definition of protected "works" to consist only of a description of the qualities common to all the works we are trying to protect. *Copyright Act* protections must be conferred only in exchange for the provision of defined public rights to use the works. Interfering with those rights would therefore suspend or extinguish the copyright, moral rights, criminal, and other *Copyright Act* protections. Parody should to be a recognized fair use. Finally, the Act must be given flexibility and credibility by introducing judicial discretion to forgive both fair uses of copyright works and fair curtailments of users rights.

The Act already provides adequate incentives to create and disseminate works, and an adequate mechanism to justly reward creators. To have our *Copyright Act* withstand the test of time, simply do not amend it now or in the future to adjust the incentives. They will rise and fall on their own. In particular, digital rights owners do not need any more advantages than copyright protection already provides, if they even need those. The specific new protections they demand are motivated by the desires to make more money by shifting the costs of enforcing their copyrights from them to the taxpayers, reducing what customers can do with digital works, and appearing more menacing through the existence of new and stronger criminal and civil penalties.

Digital works copyright owners' businesses are in a changing technical environment. Any intervention would only hinder the process of allowing them, and their end users, to adapt to the ongoing changes and establish a new balance between them.

Some of the pressure from the digital media creators is from a desire to maintain their old analogue business models in a new digital world. Copyright law should not insulate rights holders or users from having to adapt to current and future technologies. They can change more efficiently on their own, however reluctantly, than any imposed regulatory scheme can achieve. The process is well underway.

3. WHAT SORTS OF COPYRIGHT CHANGES DO YOU BELIEVE WOULD BEST FOSTER INNOVATION AND CREATIVITY IN CANADA?

Neither "innovation" nor "creativity" is presently required for copyright to subsist in a work.²⁴ The *Copyright Act* has no features for identifying and differentially treating copyright works meeting either of those criteria, and that is not its purpose.

The Copyright Act discourages innovation and creativity in the field of computer programs.

In principle, the Act currently excuses from infringement of copyright or moral rights, the use or duplication of functional aspects of works. In practice, however, the exemption is so tightly and impenetrably defined, that it is doubtful whether any article falls within the exceptions.²⁵ The definition assumes the functional aspect of a work is wholly differentiable and severable from the merely expressive. At least in the case of computer object code, the two are inextricably interlinked.

Without a workable safe harbour respecting functionality, computer object code will continue to enjoy decades of exclusivity, protection unavailable to any other type of functional product. Not only that, to get any protection at all, other functional products must

²⁴ *Copyright Act*, *supra* note 1, s. 5(1).

²⁵ *Copyright Act*, *supra* note 1, s. 64.1(1).

be inventive. The software industry not an industry in need of subsidies: Quite the opposite. This would be a good time to rectify the hasty and ill-conceived manner in which computer programs were included in the *Copyright Act*.

To create a safe harbour, re-draft s. 64.1, to reflect what must, or ought, to have been originally intended. Allow any making of another primarily functional work, or other use of a primarily functional work, to be performed, notwithstanding the fact that the object code or other functional work may have other types of copyright works as an included part of them which gets carried along. In the case of computer programs, obviously this would include the object code, which is effectively a set of machine parts, and exclude the source code, which is analogous to the blueprint for those parts, just as it applies to all other functional products.

Without this clarification, the Act achieves the opposite of its intended purpose with respect to computer programs. There is no incentive in the Act for the original programmers to improve upon their computer programs, and no ability for others to use existing programs as a point of departure for new programs.

Computer programs often become obsolete within a few years of first publication. The user's right to use the programs they have lawfully acquired, should be reinforced by requiring copyright owners to publish the source code (in machine readable form) of any program they have ceased to support, and grant all owners of legal copies the nonexclusive right to license the software incorporating their own changes. This would permit at least some users to modify or build upon the software enough to keep using it. The sanction for failing to publish the source code could be extinction of *Copyright Act* rights in other programs published by the rights holder.

During the term of copyright, any person should be free to may make a single copy of any work, including without limitation use for private study, backup, convenience, change in media, etc., and to make it available, even on the Internet, for others to exercise the same right. For one thing legislation can't stop this conduct. For another, it serves a major purpose of copyright by disseminating the work. Third,

the Supreme Court has already stepped in and cut through the labyrinth of rights and exceptions to recognize this right.²⁶

Attempts to stop private copying will just lead to widespread flouting of the law. As the House of Lords observed, "In face of the difficulties inherent in the problem generated by the mass-production of electronic equipment capable of infringing copyright Parliament has not yet determined on any course of action. These proceedings will have served a useful purpose if they remind Parliament of the grievances of the recording companies and other owners of copyright and if at the same time they draw the attention of Parliament to the fact that home copying cannot be prevented, is widely practised and brings the law into disrepute."²⁷

The *Copyright Act* also discourages the use of excerpts and ideas from copyright works because it is biased towards penalizing anyone who fails to fit squarely and word for word into one of the exemptions to copyright, and by its emphasis on statutory damages and large measures of damages by way of deterrence.²⁸ These concepts have no place in a statute based upon a balance of interests, or at the very least, they have pushed the pendulum of balance so far off to one side, that some benefits of the Act are lost.

4. WHAT SORTS OF COPYRIGHT CHANGES DO YOU BELIEVE WOULD BEST FOSTER COMPETITION AND INVESTMENT IN CANADA?

There are competing goals in this question. Increased competition deters market entry and new investment. So you will have to figure out which goal you prefer. I would go with increased competition, and let the rest follow.

How do we increase competition? Stop subsidising the competitors.

Allowing creators to opt out of copyright, in the circumstances discussed above, would create a broader competitive

²⁶ *CCH Canadian Ltd.*, *supra* note 14.

²⁷ *CBS Songs Limited (suing on their own behalf and on behalf of the other members of the Mechanical Rights Society Limited) and others v. Amstrad Consumer Electronics plc and others* [1988] AC 1013, [1988] 2 WLR 1191.

²⁸ E.g., *CAW*, *Supra* note 19 (and the cases cited therein).

market for the dissemination of out of copyright works. So there would be more competition among creators.

Why the need for three different regimes and two different regulatory agencies for regulating copyright collectives? There is no principle apparent from the Act, which suggests the need for this. It is apparent from the actions of the collectives that the regulatory regime is too generous in the tariffs being fixed and entirely ineffective at requiring collectives to compete for the business of the creators. Where the regulatory regime is creating unaccounted-for pools of money, competition is not taking place, and regulation is not succeeding in its task of compensating for its absence.

An alleged infringer may create a valid license, and therefore defence, by paying the collective's approved tariff.²⁹ But only some collectives are required to have their tariffs approved and others are merely permitted to.³⁰ Why do some users have the right to this defence and not others? It even remains an open question whether a collective which has not filed a tariff and cannot agree on a license fee with a prospective licensee, can sue the licensee for infringement or must go to the Copyright Board to have a license fee set before collecting it.³¹

Further, if a copyright collective which neither submits its tariffs nor its agreements to the Copyright Board, sues an infringer claiming damages based upon its usual fee schedule, why would a court suggest that those fees should form the basis of damages?³²

Collectives with no obligation to obtain tariff approvals, and which reach private licensing agreements with licensees, may voluntarily file the agreements within 15 days. Filed agreements are theoretically subject to review by the Commissioner of Competition, and if he or she so requests, review and possible revision by the Copyright Board.³³ As regulatory schemes go, this one seems rather illusory. Of the hundreds of agreements filed each year with the

²⁹ *Copyright Act*, *supra* note 1, ss. 68.2(2), s. 70.17.

³⁰ *Copyright Act*, *supra* note 1, ss. 67.1, 70.12.

³¹ *Copyright Act*, *supra* note 1, s. 70.2; *Masterfile Corp. v. World Internett Corp.*, [2001 FCT 1416](#), 16 C.P.R. (4th) 139, 215 F.T.R. 266 at para 46, Simpson J [*Masterfile*].

³² *Masterfile*, *supra* note 31 at 47 (obiter dicta).

³³ *Copyright Act*, *supra* note 1, s. 70.5.

Copyright Board since it was established in 1986,³⁴ not one has been reviewed by the Commissioner of Competition,³⁵ let alone been referred by the Commissioner to the Copyright Board for revision.

Many collectives, such as the photograph licensing collectives, simply ignore the need to file their tariffs.³⁶ They suffer no apparent consequences.

On the other side of the coin, at least some copyright collectives do not appear to be very responsive to the rights of their members. For example, the collective which receives the blank storage media levy, the Canadian Private Copying Collective, has regulated rates but apparently no regulatory oversight of their distributions to the actual copyright holders. The CPCC has yet to distribute \$53 million.³⁷ By comparison, in the single year 2007, it netted \$28 million for distribution. Its undistributed cash is a more than a quarter of its total historical revenues, over 8 years, of \$206 million (after expenses). It did not begin distributing 2007 royalties until September 2008.³⁸ Why is it holding 18 months worth of net income undistributed?

Similarly, Access Copyright, the collective licensing photocopying outside Quebec, had 14 months of undistributed royalties in reserve in 2008. In addition, despite being a not-for profit organization, it keeps a generous proportion of its income after expenses separate from the funds allocated for distribution as royalties, for the vague reason: "...in order to have funds available to support its purpose...".³⁹ Yet it doesn't seem to spend them, year after year. The collective expressly notes that "[t]he corporation is not subject to externally imposed capital requirements".⁴⁰

³⁴ Copyright Board, *Annual Reports, 1986–2008*, <[http://www.cb-cda.gc.ca/about-
apropos/reports-rapports-e.html](http://www.cb-cda.gc.ca/about-
apropos/reports-rapports-e.html)>.

³⁵ Private communication from Ms. Lise St-Cyr, Senior Clerk of the Board/Greffière principale Copyright Board of Canada/Commission du droit d'auteur du Canada, August 6, 2009.

³⁶ See e.g. *Masterfile*, *supra* note 31.

³⁷ Canadian Private Copying Collective Financial Highlights, 2007.

³⁸ *Ibid.*, at note 3.

³⁹ Access Canada, *Annual Report, 2008* at note 12.

⁴⁰ Access Canada, *Annual Report 2008: Balance Sheet* (Access Canada has \$10.7 million in "Unrestricted net assets", which is 20 percent of its assets. Another \$2 million is "internally restricted for contingencies." These funds are in addition to those set aside for distribution to rights holders).

If these collectives had to compete for the business of their rights holders, and for the business of their licensees, these abuses would diminish, and the regulatory burden paid for by the taxpayers would diminish and perhaps become unnecessary. Until that happens, the regulatory function should be strengthened to keep these abuses from continuing.

As for increasing investment in Canada, Canadian film and television producers have demonstrated that they are capable of producing works of the highest technical quality. Canadian writers seem to win a disproportionate share of literary awards. We have all the talent and production facilities to make movies and television programs with international appeal. I do not know what the missing ingredient is, but we appear to be close to breaking out into international markets, especially the United States, although with our multi-ethnic population we ought to be able to cherry-pick foreign markets whose production values have not yet equalled ours and make some money there. Availability of capital is always a limiting factor in the movie business — it is astonishing how little there is in Europe. Major films made there are few, and often must be joint multinational ventures scraping together capital from various governments and corporations.

Perhaps we could provide performance guarantees for investors who finance a minimum number of qualifying Canadian films, that they will at least get their money back.

5. WHAT KINDS OF CHANGES WOULD BEST POSITION CANADA AS A LEADER IN THE GLOBAL, DIGITAL ECONOMY?

a) Leadership in the formulation of copyright policy

Canada will not become a leader by being bullied into imposing copyright obligations upon ourselves, that we would not have otherwise chosen. Similarly, being one of a pack of countries to adhere to a new treaty does not constitute leadership, even if we played a prominent role in drafting it. Only originality, and independence of thought and action, with a superior result, can make us leaders.

Becoming a leader in foreign policy, by the device of being seen to be prominent in drafting new treaties, should not come at the expense of the quality of the treaties or our domestic laws arising from them. Sound copyright policy should not be sacrificed, so Canada can pride itself on a leadership role in initiating international copyright treaties, as Canada has been doing.

Canada must effectively foster its own creative industries, with special emphasis on the delineation and development of our own myriad cultures, and foster access to the export opportunities available to us, while ensuring that Canadians have access to foreign works at minimal cost.

One course of conduct which would extinguish any pretence of Canadian leadership in copyright policy, is yielding to the arm-twisting of the United States. On the contrary, we should follow their historical example and not their current rhetoric.

The concept that its demands are "minimum standards" of copyright has been created by one country, the United States of America, and echoed by a lobby group of copyright owners, the Canadian Intellectual Property Council. There are no minimum standards of copyright, except those each country chooses to impose upon itself through adherence to international conventions, typically the Berne Convention,⁴¹ or through domestic legislation. Do not be misled by, or waste time engaging, their self-serving rhetoric.

The U.S. has put 51 countries, including its close allies Israel and Canada, on its nefarious "watch list" alleging that the countries fail to provide adequate copyright protection.⁴² The United States has exactly the same moral authority to dictate copyright standards now that copyright works are their major export, as they had in refusing to permit foreigners to enforce their copyrights in the U.S. in the 19th century when the U.S. was a net importer of copyright works.⁴³

⁴¹ *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.

⁴² See e.g.: <<http://www.cbc.ca/technology/story/2009/04/30/copyright-piracy.html>>

⁴³ Louie Crew, "Charles Dickens as a Critic of the United States" (1974) *Midwest Quarterly* 16.1 ("Many contemporary critiques of American civilization are anticipated by that of Charles Dickens, who as England's celebrated novelist and democratic reformer first visited the United States in 1842, early in his career.... ...What upset the Americans with their hero, whom they greeted as the most welcomed visitor since Lafayette (Forster, I, 186), was his stand in favor of

In recent decades, the U.S. has shown no compunctions about bullying even its closest allies to advance its commercial and political interests, even disregarding its own treaty obligations (soft lumber tariffs come to mind, among other examples). The fact that our arm is being twisted is a compelling reason to make sure that any decision Canada makes about the state of our copyright law bends over backwards to be home-made and self-interested, regardless of its effect on the U.S.⁴⁴

The U.S. did not implement the Berne Convention of 1887 until March 1, 1989. One reason for its refusal to sign it was its refusal to recognize moral rights, as adherence to the Convention requires. Upon joining the Convention, the U.S. implementing legislation did not implement the moral rights required by the Convention.⁴⁵ The U.S. Senate blithely resolved that the requisite moral rights have always been present in their common law. This came as news to the U.S. copyright law bar, who retain a healthy scepticism on the subject to this day.⁴⁶

Another reason it took the U.S. 102 years to join the Berne Convention, was its reluctance to give up its copyright registration requirements. Again, its implementation of the Convention was more

International Copyright. Without it American publishers were paying no royalties on imported manuscripts").

⁴⁴ Alas, we may need to acquire nuclear weapons to retain our independence.

⁴⁵ The *Berne Convention Implementation Act of 1988*, 17 USC 101 creates no moral rights, and prohibits direct enforcement of the Convention in U.S. courts.

⁴⁶ Ronald B. Standler, "Moral Rights of Authors in the USA", Ronald B. Standler's Homepage, <<http://www.rbs2.com/moral.htm>> (During the passage of the Berne Convention Implementation Act, the U.S. Congress specifically stated in 1988 (Senate Report 100-352) that rights equivalent to moral rights of authors were already recognized in the USA under:

1. the common law of misrepresentation and unfair competition,
2. 43(a) of the Lanham Act, 15 USC § 1125(a)(1)(A), which prohibits "false designation of origin, false or misleading description of fact" that is "likely to cause confusion, ... mistake," or deception about "the affiliation, connection, or association" of a person with any product or service.
3. defamation (libel) law.

"Therefore, Congress asserted that law in the USA already complied with 6^{bis} in the Berne Convention, without any additions or changes to Copyright law in the USA".

"17 USC § 104(c) specifically prohibits any person in the USA from relying on the protection of any right or interest specified in the Berne Convention, i.e., all rights in the USA must derive from statutes in the USA or common law in the USA").

token than effective. Although registration is no longer a prerequisite to the existence of a U.S. copyright, without prompt U.S. registration of copyright in a work upon its creation, the remedies available for its infringement in the U.S. are severely limited.

The U.S. is in no moral position to hector anyone about adhering to its standards of copyright law.

If we want to be a leader, we should extend the blank media storage levy to all digital storage media, and refuse *Copyright Act* protection to rights owners who restrict legal uses of, and access to, published works. Bill C-61 proposals such as, preventing Canadians from keeping their legal copies of these digital works on publicly accessible VPNs or folders on their hard drives, and prohibiting circumventing TPMs which interfere with their lawful enjoyment of their works,⁴⁷ are retrograde steps which go contrary to the fundamental purpose of the *Copyright Act*.

We will need to reverse the Copyright Board decision that posting works online authorizes copying, which is inconsistent with previous cases and in any event is government censorship, and is an undesirable limitation on the right to access published works. We should encourage other countries, to maintain their versions of the blank media storage levy in operation, to cover all digital media, and to resist supporting TPM and other means of limiting access to published works.

While the U.S. may threaten retaliation, its citizens will continue to scoop up what to them are free downloads, largely unhindered, much as they buy Canadian pharmaceuticals. The U.S. will have a strong incentive to adopt a blank media storage levy scheme of its own to recover the lost revenue. That is leadership.

How can we become a leader in benefiting from our copyright system?

The largest gain we can make in benefiting from our copyright system is also the position already been recognized abroad

⁴⁷ Bill C-61, *supra* note 3.

as making Canada potential leaders in copyright policy — liberalizing access to copyright works.⁴⁸

At a practical level we can make our Act easier to apply in commerce. The *Copyright Act* can be readily amended to make the creation and commercial exploitation of copyright works easier and cheaper, to the greater benefit of creators, users and the public.

Here are some specific changes, which would eliminate needless complications in paperwork, legal fees, identifying rights holders, and finding out the term of copyright in each work.

The person who commissions any work, or who employs the creator to make any work, should be the first owner of copyright, unless the contrary is expressly stipulated in writing prior to the creation of the work. In the U.S., this is called the "Work Made for Hire" provision, and it works well to reduce legal costs and needless complications. It also conforms to the people's expectations.

The current reverse onus on businesses commissioning commercial artwork and logos is counter-productive. Often my clients spend their limited start up capital on commissioning a second logo, web site or other work, after getting belated legal advice about the consequences of the copyright ownership and moral rights situation they did not know enough to contract out of the first time.

Exclude from moral rights protection and any other ongoing obligations on the owner (such as reversionary rights arising from bankruptcy), works commissioned for business purposes, (such as trade marks, theme songs, jingles, packaging and advertising), unless otherwise stipulated in writing before the work is created. Works which are created for commercial use are usually not appropriate subjects for the rights of integrity, attribution and association. Rather than requiring releases to be obtained each and every time, just create a default exception in the act to begin with, and be done with it.

⁴⁸ John Borland, "Canada Deems P2P Downloading Legal", *CNET News* (December 12, 2003), online: <http://news.cnet.com/2100-1025_3-5121479.html> ("Canada has already raised the hackles of some copyright holders through its reluctance to enact measures that significantly expand digital copyright protection, as the controversial Digital Millennium *Copyright Act* (DMCA) has done in the United States. As a result, Canada could become a model for countries seeking to find a balance between protecting copyright holders' rights and providing consumers with more liberal rights to copyrighted works").

Fix the term of copyright to a set number of years from creation, without regard for the date of death of the author or the date of first publication. The public is entitled to know when copyright expires, and there is no assurance of being able to find out. Having to ascertain the date of an author's death is a pointless complication, especially when the term of copyright is an arbitrary period anyway.

Eliminate the right of reversion altogether, at least for works commissioned for business purposes, such as trade marks. Trade marks have an indefinite life span. They are valuable to the public as much as to their owners, and, the right to their use is protected by statute and common and civil law. Many trade marks are also copyright works. They are often created by advertising agencies or other businesses which hire freelance artists to do the work. Thus the first owner is often the creator. It is a detriment to the public to force the retirement of a trademark upon which they rely, and it is no benefit to the heir who becomes the copyright owner, who cannot use it without infringing. The most he or she can do is try to sell it back to the trademark owner, which faces the distasteful prospect of being legally blackmailed into buying back its own property.

The late Bill C-61 contained restrictions on permitting online access to copyright works.⁴⁹ This is where the story turns ugly. It is hypocritical to charge Canadians a fee for the blank storage media, and then deny them access to works to copy. It is also inconsistent with the purpose and policy of the Act, which is to disseminate published works as widely as possible. As previously stated, maximizing access will demonstrate international leadership in defining and maximizing the benefits to be granted by copyright owners in exchange for copyright protection.

Here the story gets uglier still. Using copyright law to restrict access to published works is censorship. It is sad turn for a civilized country to take, and a perversion of copyright and democratic principles. It is the fundamental purpose of the Act to disseminate the benefits of works of self-expression. Our country should have no part of limiting access to published works, or aiding or abetting those who do.

I urge the government to amend the *Copyright Act* to withhold copyright, neighbouring right and criminal law protection

⁴⁹ Bill C-61, *supra* note 3.

for any work whose technical protection scheme or licensing terms limits access to published works or the enjoyment of lawful copies of them by the public.

CONCLUSION

Let us remake copyright based upon principles and not interests. Define the protected subject matter by its purpose, namely encouraging self-expression in nonfunctional arts, in forms fixed to provide an enduring record of the creation. Remove object code from copyright protection: it is a square peg in a round hole, and is more appropriately protected as all other functional works are, by patent, trade secret and contract law.

Let us increase the benefits of copyright to Canadians, by making copyright a true bargain between creators and the public, with each having defined rights. Interference with the copyright owners' rights would be penalized as infringement, and interference with users' rights would forfeit owners' rights under the *Copyright Act*. Specific instances of fair uses of copyright or fair limitations of users' rights may be legislated, but ultimately the legislation will work better if judges are free to determine what a fair use or fair limitation is in a given circumstance. Balance requires fairness, and fairness requires the removal of the minimum statutory damages and the punitive mindset used in assessing damages that prevails now.

Lower the transaction costs and complications of using copyright by simplifying the scheme applicable to the creation and transfer of works created for use in commerce. Copyright in all commissioned works should belong to the purchaser. Moral rights should automatically be waived in commissioned works. Reversionary rights, such as those due to bankruptcy and mortality, should not apply to commissioned works, nor should any other ongoing obligation. In each case these rights can continue to be defined and enforced by statute if specifically contracted for before the work is created.

Canada should never abet technical protection means which limit access to, and circulation of, published works. If our country wants to show leadership, let us at least show it by drawing the line at censorship. If rights owners want to rely on technical protection

means, or contractual "license" terms, to restrict access to their works, let them do so in place of the copyright protection Canada offers, not as part of it. Obtaining the widest possible access to published works is the whole point of copyright – let us not lose sight of that.