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Chair

Mr. Gordon Brown

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● (1530)

[*English*]

The Chair (Mr. Gordon Brown (Leeds—Grenville, CPC)): I call the meeting to order.

Good afternoon, everyone. This is meeting number 5 of the Legislative Committee on Bill C-32.

Today, first of all, I'd like to thank our three witnesses. We have Pina D'Agostino, professor of intellectual property at Osgoode Hall Law School at York University. Second is Professor Michael Geist, Canada Research Chair of Internet and e-commerce law at the University of Ottawa. Finally we have Barry Sookman, partner at McCarthy Tétrault and co-chair of the technology law group there.

On behalf of the committee, I'd like to thank all three of our witnesses for appearing today on such short notice. Thank you very much.

We will start with a five-minute presentation from Professor Pina D'Agostino.

Prof. Giuseppina D'Agostino (Professor of Intellectual Property, Osgoode Hall Law School, York University, As an Individual): I want to start by thanking the committee for inviting me as a witness on such an important issue in the history of Canadian copyright, which I care deeply about.

I offer my comments as a law professor at Osgoode Hall Law School and as founder and director of IP Osgoode, Osgoode Hall Law School's IP and technology program. I offer my comments without an agenda or interest in supporting any one stakeholder group. I aspire towards a balanced approach that weighs all the challenges the government faces and the various stakeholders' interests.

The bill is ambitious in its attempt to achieve this balance, as there are numerous provisions put forward that try to address the varying interests and challenges. Despite this valiant attempt, the bill does need fine tuning, since some issues are still left unaddressed and others are ambiguously addressed.

If we start with the policy that we want to have end-users—the public—enjoy works, that we want to ensure that authors have the ability to create and to continue creating, that we want to have creativity and innovation flourish, and that we want to have the greatest possible dissemination of works while ensuring at the same time that there's some viable means of compensation for the use of others' works, then this bill still needs some work. If we want legislation that is clear and understandable to Canadians, then we need to do better.

In the time I have I will focus on just a few points that can be rehabilitated in this committee.

My first point deals with the amendments proposed for section 29 on fair dealing. While it is salutary to have added “parody or satire” as a new purpose, I am still unclear as to why “education” was added as a new purpose under this provision. This new purpose is too broad and invites years of litigation to clarify it, which will lead to access-to-justice issues and will force the courts to resolve matters that are for the government to legislate with confidence in so doing.

What is the policy behind this provision? What problem is there with respect to education that is not currently addressed in the other sections of the act? If the government has something in mind, it should simply say so expressly and not purport to do so ambiguously through a catch-all term, hoping that whatever it is that is meant or might be meant is addressed. Significantly, there is no precedent case law for this purpose, and so the courts will be left to do the job of government. I should note that there is now ample case law on the other purposes.

How do we fix it?

Legislating the Supreme Court of Canada's CCH factors is not an answer. It does nothing to clarify what we mean by education. The government should pronounce itself on court decisions when it wishes to overrule them, not when it agrees with them, and certainly not when it has before it a unanimous Supreme Court of Canada decision, as indicated with CCH. It might, for instance, intervene to legislate a lower court decision it agrees with if it thought higher courts might overrule it, but it makes little sense to intervene and restate what the Supreme Court of Canada has already said.

So the question remains: how do we fix it? Do we legislate the Berne or TRIPS three-step test that restricts permissible exceptions in national legislation to certain special cases that do not conflict with the normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author? I don't think this, by itself, is the full answer either. This would be inviting more ambiguity into an already ambiguous framework in defining for Canada what is meant by “normal exploitation”, what is meant by “unreasonably prejudice”, what the “legitimate interests of the author” are, and so on. It would run the danger that Canada's law would be determined in Geneva by WTO panels making decisions on the TRIPS provisions.

● (1535)

What we need to do to fix fair dealing with respect to education as a purpose is to isolate, at a very basic level, the problem we are trying to solve through legislation, and then express that problem.

If we know what it is, then we should say so. If we don't know what it is but have a sense that we need to do something, then I would suggest the use of a more flexible framework. For example, you could include a provision at the end of section 29 stating something like, “it is not an infringement of copyright to deal with such educational purposes in such manner as the Governor in Council may prescribe by regulation”.

This would allow for a more evidence-based approach and allow government departments with expertise to helpfully collect evidence and be specific on what they need to cure by legislation, and to be nimble and flexible in making adjustments to copyright problems in the educational sector as they arise from time to time.

My second and concluding point is that given the policy question of balance, the issue of tackling matters for creators head-on in a way that would ensure that they are compensated for the uses of their works is not addressed. I would be happy to address this matter more fully if given the time in discussion.

Creators, in some ways, are caught between owners on the one hand and users on the other. An area I've done a lot of work on is the copyright relationship between owners and creators. In terms of this bill, creators seem to be potentially undermined either by the revised fair dealing clause or by another provision, section 29.21, on non-commercial user-generated content, which in its current form also remains vague and may have unintended consequences.

Those are my introductory comments. I look forward to your questions.

The Chair: Thank you very much.

Professor Michael Geist is next.

Prof. Michael Geist (Canada Research Chair, Internet and E-commerce Law, University of Ottawa, As an Individual): Thank you, Mr. Chair.

Good afternoon, everyone.

My name is Michael Geist. I am a law professor at the University of Ottawa. As I'm sure many of you know, I have been very active on copyright policy issues for many years. In 2007 I launched the Fair Copyright for Canada Facebook group, which grew to over 92,000 members and has local chapters across the country. Earlier this year I edited *From “Radical Extremism” to “Balanced Copyright:” Canadian Copyright and the Digital Agenda*. This book is the largest academic study on Bill C-32 to date, with peer-reviewed contributions from 20 leading Canadian experts.

That said, I appear before this committee today in a personal capacity and I represent only my own views.

While I am sometimes characterized as a copyright critic, the reality is that I am supportive of much of Bill C-32. When the bill was first tabled, I described it as flawed but fixable, and I had strong support for many of the compromises that are found within it. That's still my position.

I'm happy to talk about any elements of the bill, but I want to focus my opening remarks on two issues: fair dealing and digital locks. As you know, I believe the fair-dealing reforms represent an attempt to strike a balance between those seeking a flexible fair-dealing provision and those who are largely opposed to new exceptions altogether. I think the Bill C-32 compromise is largely a good one.

As a result of full-page advertisements and regular op-eds, we are all aware that some groups claim these changes will harm Canadian culture. I'd like to point to two reasons for thinking that the reality is far less worrisome and offer a potential amendment to alleviate some of those ongoing concerns.

First, fair dealing in education is not new. It already encompasses research, private study, news reporting, criticism, and review. As you can well imagine, these categories cover a considerable amount of the copying on Canadian campuses. These changes are not revolutionary but evolutionary. They are reforms that will enable the use of new technologies in the classroom and support student creativity, innovation, and curiosity.

Second, and most importantly, Canadian fair-dealing analysis involves a two-stage, two-part test. Part one is whether the use or the dealing qualifies for one of the fair-dealing exceptions. If it does qualify, part two is an analysis of whether or not the use itself is fair. The extension of fair dealing to education only affects the first part of the test. While Bill C-32 will extend the categories of what qualifies as fair dealing, it does not change the need for the use itself to be fair.

The Supreme Court of Canada has identified six non-exhaustive factors to assist a court that is part of a fairness inquiry, and this past summer the Federal Court of Appeal, in a case involving educational copying, confirmed that the Bill C-32 changes will still require a fairness analysis.

While I think some of these concerns are misplaced, there is still the potential to provide greater certainty to alleviate some of the writers' and publishers' fears. I believe this can be accomplished by codifying that six-part fairness test within the Copyright Act. This reform would ensure that judges would be required to assess the fairness of any use—including education—before it was treated as fair dealing. I believe it would also put to rest claims that fair dealing would lead to a free-for-all. In fact, quite the opposite is true; by design, the reforms would ensure that fair dealing is fair for all.

With regard to digital locks, which have been among the most discussed and most criticized aspects of the bill, I should start by clarifying that much of the concern does not come from digital locks per se. Companies are free to use them if they so choose, and there is general agreement that there should be some legal protection for digital locks since it is a requirement of the WIPO Internet treaties, and that's a clear goal of this legislation.

Rather, the concern stems from Bill C-32's unbalanced position on digital locks, in which the locks trump virtually all other rights, as the committee itself heard just last week from Mr. Blais in the context of education. This distorts the copyright balance not only for the existing exceptions within the Copyright Act, but also for the new consumer rights, which can be trumped by a digital lock just at the time they are widely found in devices, DVDs, electronic books, and more.

The most obvious solution to this would be to amend the bill to clarify that it is only a violation to circumvent a digital lock if the underlying purpose is to infringe copyright. This approach, which has been adopted by some of our trading partners, such as New Zealand and Switzerland, would ensure that while the law could be used to target clear cases of commercial piracy, individual consumer and user rights would be preserved.

I'd like to quickly make five points with respect to this proposal. First, this approach is compliant with the WIPO Internet treaties, which offer considerable flexibility in their implementation. I know there are competing opinions on the issue, but there is no shortage of scholarly analysis—including a piece I did in my book—as well as country implementations that confirm this is an option open to Canada. In fact, we need look no further than Canada's own Bill C-60 to see that Canadian officials recognize that this approach is consistent with WIPO.

Second, 13 years after the treaty, claims that Canada should adopt a U.S.-style approach run contrary to the emerging international record.

● (1540)

With the benefit of experience, there is a clear trend towards greater flexibility. Even the United States has recently added exceptions for jailbreaking phones and unlocking DVDs for some non-commercial purposes.

Third, the approach is entirely consistent with the goals of Bill C-32. It enables us to target commercial infringers who are profiting from their actions, since their circumventions would still constitute violations of the law. Meanwhile, it would provide businesses with the legal protections for locks that some are looking for and maintain consumer fairness by assuring Canadians that their personal property rights will still be respected.

Fourth, it is worth emphasizing that amending the new consumer exceptions alone—format shifting and the like—is not enough. For example, if the lock provision on format shifting were removed, consumers would still face the barrier of the general anti-circumvention provision. In order to address the issue, both must be amended to preserve the digital copyright balance.

Finally, in the event that the committee instead wants to consider specific, new, additional exceptions to the digital lock approach, I have provided the committee clerk with a full list of potential reforms, many of which are based on the rules found in other countries.

I look forward to your questions.

● (1545)

The Chair: Thank you very much.

We'll move now to Barry Sookman.

Mr. Barry Sookman (Partner, McCarthy Tétrault, Co-Chair of Technology Law Group, As an Individual): I would like to thank the committee for inviting me to appear today to provide input on Bill C-32.

Before starting my remarks, I would like to give you some background. I'm not telling you these things to boast, but because I understand some have expressed concern that I have one or two clients implicated in this legislation and that their views are shaping my perspective. This is not the case. I'm a lawyer who specializes in this area. I have worked and taught in it for many years. I'm a partner with the law firm McCarthy Tétrault and the former head of its intellectual property group. I'm an adjunct professor of intellectual property at Osgoode Hall Law School. I'm the author of five books, including the leading treatise on computer and Internet law. I'm a member of numerous committees, including those in the IP area. My involvement in copyright matters for creators, users, and intermediaries spans decades of practice. I've appeared in three precedent-setting Supreme Court of Canada cases, including CCH, which modernized fair dealing in Canada, and the Tariff 22 case, which examined the liability of ISPs. I appeared for the ISPs opposite a rights holder, SOCAN.

I'm here today in my personal capacity and am not representing my clients.

In introducing this bill, the government made it clear that its purpose was to enable Canada to have copyright legislation that would benefit the Canadian marketplace. It was drafted to create framework laws and to enable Canada to be a leader in the digital economy in line with our trading partners. I support these objectives. There are, however, areas where the bill will have unintended consequences that are inconsistent with those objectives. I hope to assist members of this committee in understanding these issues, many of which are technical in nature. In the limited time I have to address the issues, I would like to focus on several examples of technical problems that need to be fixed.

The government has said that the bill will give owners stronger legal tools to go after online pirates that facilitate copyright infringement. Minister Clement said that the bill goes after the bad guys, the wealth destroyers. To address this problem, the bill has a new section on the enabling of infringement. A technical problem is that as drafted, the section is likely ineffective, because it applies only to services designed primarily to enable acts of infringement. Most file-sharing sites, including peer-to-peer, BitTorrent, and pirate-hosting sites, are not designed primarily to enable acts of infringement but to facilitate the sharing of information and files.

There are two other technical problems. The government's intention is that ISPs should be exempt from liability when they act strictly as intermediaries. On the other hand, Bill C-32 is intended to ensure that those who enable infringement will not benefit from the ISP exceptions. However, the drafting does not make this clear. Only two out of the four exceptions expressly say this. Based on the differences in wording, a court might well conclude that a pirate-hosting site gets an ISP exception even when it is liable for enablement. This could not be anybody's intent.

Lastly, the bill exempts commercial enablers, the wealth destroyers, from being liable for statutory damages even when they facilitate infringement for a commercial purpose. This can't be anybody's intention.

The bill also contains a new exception that would let individuals take existing content and use it to create user-generated content. The intent is to permit an individual to use content to make a home video or create a mashup of video clips. This is an exception that to my knowledge does not exist anywhere else in the world. From a technical drafting perspective, the exception is so widely cast that it would most likely violate Canada's WTO TRIPS obligations. TRIPS mandates that exceptions must be subject to what is known internationally as the three-step test. The exception, as drafted, would permit individuals to do almost anything that the author could do with his or her work— including creating translations, sequels, or other derivative works—and publish the result on the Internet. They could also create collective works or compilations of works, such as the best of a TV series or their favourite iPod playlist, and post those on the Internet, and they can do a lot more. The result is that the author loses significant control over the uses of his or her work, a fundamental copyright concept.

● (1550)

Over and above this, there could be significant economic consequences to the author. The intention is to permit uses that would have no effect on the market for the work; however, the drafting permits aggregate effects on the market for the work, which would be very damaging and substantial.

Also, the individual's use of the UGC work must be non-commercial. A website operator can charge for disseminating the UGC work, but the author gets none of the remuneration. They would, however, in other countries that don't have this exception, countries that have let the markets solve the problem.

There are other technical issues with the bill that also need addressing, but, as the chair has pointed out, I'm out of time.

I would like to thank the committee again for inviting me to appear. I look forward to answering your questions.

Thank you.

The Chair: Thank you very much to our witnesses.

We're now going to move to the first round of questioning. It will be a seven-minute round. The first questions will go to the Liberal Party.

Go ahead, Mr. Rodriguez.

Mr. Pablo Rodriguez (Honoré-Mercier, Lib.): Thank you very much, Mr. Chair.

[*Translation*]

Welcome everyone, and thank you very much for being here.

You are the first witnesses, so we will find a way to make this work. Given there will usually be three people, I would ask you, please, when a question is put, to answer rather quickly.

Give a quick answer, say yes or no. The perception of creators is that this bill is not at all balanced and that it will be harmful to them. Are you of that opinion?

Mr. Geist, you have the floor.

[*English*]

Prof. Michael Geist: Yes or no? I think there are provisions in there that clearly benefit creators. I think there are some provisions that benefit users, although I think there's some concern with those. I think we can address some of the concerns that creators have, particularly with respect to fair dealing, in the way that I just described.

[*Translation*]

Mr. Pablo Rodriguez: Thank you.

Ms. D'Agostino, it is now your turn.

[*English*]

Prof. Giuseppina D'Agostino: I mentioned in my comments that creators are somewhat in the middle. On the one hand, if we just step back, copyright is meant to protect entitlement interests. If we care about creators and the relationship between the author and owner, that needs clarification. We would have more provisions in the act on the copyright contract aspects.

From the user perspective, I mentioned that there is the UGC and fair dealing clause that could have unintended consequences on creators.

[*Translation*]

Mr. Pablo Rodriguez: Thank you.

Mr. Sookman, what is your view?

[*English*]

Mr. Barry Sookman: You ask a very good question. It's one that I could spend all of your time on. Unfortunately, I can't do that.

There are two perspectives here. One is looking at the bill in its current form and looking at the bill as it could be when the unintended consequences are removed. In its present form, some of the provisions, particularly the exceptions, are very widely cast and could have very damaging effects on creators. If, on the other hand, the bill is tightened up to achieve many of the objectives that the government has set, then I believe it would be balanced.

[*Translation*]

Mr. Pablo Rodriguez: My impression is that this bill is, frankly, unbalanced and that it could be harmful to creators. A series of measures hit or penalize the creator. I am thinking of lost income due to copying for private use, exemptions, education. I also have in mind ephemeral rights, and there are many more.

Would you acknowledge that because of that, there could in many ways be lost income or rights on the part of creators?

[*English*]

Prof. Michael Geist: I'm sorry that this isn't yes or no, but I think that we have to unpack some of the various provisions a little bit. The ephemeral rights issue is one in which clearly some revenue is at stake. I'm sure you'll get both sides in to talk a bit about what's being paid for and whether or not it's appropriate for it to be paid for, but if the bill stays in its current form, then yes, there's lost revenue in that regard.

On some other elements—for example, time shifting—I think that to most Canadians the notion that someone ought to be compensated for recording a television show doesn't represent the—

● (1555)

Mr. Pablo Rodriguez: Let's stay with you for a second, then.

Regarding the education example, don't you think that the exemption, as it is now, would cost revenues to some of the creators, writers, or producers?

Prof. Michael Geist: Right. As I mentioned in my opening remarks, I think that any copying that takes place, including under the new exception for education, must still be fair. It would be disingenuous to argue that there is going to be no copying that's currently compensated for that might now fall within fair dealing, but by definition any copying that does indeed qualify through the court's analysis is fair.

[*Translation*]

Mr. Pablo Rodriguez: Thank you.

Ms. D'Agostino?

[*English*]

Prof. Giuseppina D'Agostino: I think that the fair-dealing provision, as it's currently configured, will have unintended consequences, largely because it will let the issues be put to the courts to clarify exactly what "education" is. If we think from a creator's perspective, do we, for instance, envisage a private school that teaches English as a second language and photocopies books for teaching English?

Mr. Pablo Rodriguez: You're saying this could cause a loss of revenue for the creators.

Prof. Giuseppina D'Agostino: It is a possibility.

Mr. Barry Sookman: It's unquestionably true that this will cause loss of revenues to creators. It won't be simply the broadcast mechanical royalty, which takes an existing situation with an existing tariff and removes money that the Copyright Board has already valued.

On the educational exception, I think it's unquestionably true, because by definition some dealing is free dealing that would have been compensated for before, so there definitely will be loss of revenues there. On the UGC provision, for example, there would be loss of revenues, because that is being monetized today in the United States and in Europe, but iIt won't be in Canada, and there are other examples.

The Chair: One moment, members. The bells are now going. If we are going to continue for some time before the votes—it should be a half-hour bell—we are going to need unanimous consent from the committee to continue for now.

Mr. Pablo Rodriguez: Is this the same vote? Is this the six o'clock vote?

The Chair: No, this is a vote that has now been called.

Mr. Galipeau, are you moving for unanimous consent?

Mr. Royal Galipeau (Ottawa—Orléans, CPC): I'm proposing unanimous consent for 15 minutes.

The Chair: Do we have the consent of the committee?

Hon. Dan McTeague (Pickering—Scarborough East, Lib.): Might it not be better to leave, if we are going to do so, say, five minutes beforehand? It's just down the hall. I don't think we need 15 minutes. I mean no offence, but it's five minutes, and then we'll come back.

The Chair: Okay. Are we agreed?

Some hon. members: Agreed.

The Chair: Okay, we will continue. Thank you.

Mr. Rodriguez, you have the floor.

[*Translation*]

Mr. Pablo Rodriguez: The people from the Barreau du Québec said that Bill C-32 was not...

Mrs. Carole Lavallée (Saint-Bruno—Saint-Hubert, BQ): Excuse me, but my colleague reminded me that the whips, if they believe that everyone is present in the House, can move things forward and start before the half hour in question is up. It is therefore not a good idea to go on in this way, up until the very last minute.

[*English*]

Mr. Pablo Rodriguez: Okay, 15 minutes—

[*Translation*]

Mrs. Carole Lavallée: Mr. Chairman, we heard the bell announcing a vote to be held. Why do we not close our books and come back right after the vote? I believe that that would be the most reasonable thing to do.

[*English*]

Mr. Royal Galipeau: What's she's doing is denying unanimous consent.

[*Translation*]

Mrs. Carole Lavallée: No, it is because I do not agree.

[*English*]

The Chair: We've already asked for unanimous consent. We got 15 minutes and there was a general consensus for 20, so let's go for 15 minutes from now.

[*Translation*]

Mrs. Carole Lavallée: But we do not have unanimous consent, Mr. Chairman.

[*English*]

The Chair: We did get unanimous consent for 15 minutes so we'll continue until 4:15 p.m. Members can go if they wish, but we did get unanimous consent for 15 minutes.

Continue, Mr. Rodriguez.

Mr. Pablo Rodriguez: Can I go for sure now?

The Chair: You're back on. We'll start the clock when you commence.

Mr. Pablo Rodriguez: So I still have five or six minutes, right?

The Chair: No, you have one minute and 50 seconds, Mr. Rodriguez.

[*Translation*]

Mr. Pablo Rodriguez: The people from the Barreau du Québec said that Bill C-32 is not consistent with international standards. Do you agree with them?

[*English*]

Prof. Michael Geist: Absolutely not. When you take a look at some of the provisions with respect to fair dealing or with respect to digital locks or whatever, it's clear the bill has been vetted by those who recognize what the standards are in international law, and I believe the law is compliant as currently drafted. That doesn't mean I don't want to see changes, but I think it's compliant in the way it's drafted.

● (1600)

[*Translation*]

Mr. Pablo Rodriguez: Ms. D'Agostino?

[*English*]

Prof. Giuseppina D'Agostino: I can see the sentiment animating the comment. Perhaps if we go back to a three-step test and the creators' rights, if we look at the fair dealing provision and maybe the UGC provision, then it may contradict international law.

Mr. Barry Sookman: In my view, several provisions would not comply with a three-step test. In my view, education, as currently drafted, is not a special case. It would affect the market and it would unreasonably prejudice the interests of the authors. The UGC provision as well is not a special case. It applies very extensively. It would undermine the market and it would have unreasonable prejudice.

Mr. Pablo Rodriguez: So this should be debated because it's not clear if some sections comply or not.

[*Translation*]

Do I have any time left?

[*English*]

The Chair: You have 30 seconds, Mr. Rodriguez.

[*Translation*]

Mr. Pablo Rodriguez: Internet service providers always say that they are not responsible for the "tube" and that they should not have other obligations. Given their role, should they not be held further responsible?

[*English*]

Prof. Michael Geist: Absolutely there should be responsibility, and I think the approach that the bill takes on notice and notice is one through which there is responsibility on the part of the ISP. It's one in which there are significant costs incurred by an ISP, but at the same time what it does is look at the experience in other jurisdictions and try to strike the appropriate balance so that there are remedies for rights holders and appropriate privacy and other protections for users.

The Chair: Thank you very much.

We'll have to move on to Madam Lavallée. *Vous disposez de sept minutes*.

[*Translation*]

Mrs. Carole Lavallée: Thank you very much.

You talk about a so-called balanced bill, and I must admit that I fail completely to understand you. When we read it, we see that it sets out a good many exceptions. The Bloc Québécois, Quebec performers, a whole slew of organizations, that I could list for you, involved in culture or consumer rights, as well as the Barreau du Québec, find that this bill is unbalanced. Do you know why?

One of the reasons is that we analyse the issue differently. Our approach is not the same. In English, you talk about "copyright", in other words the right to copy. In French, and based upon our Quebec values, we talk about "*droit d'auteur*" and the "*Loi sur le droit d'auteur*", in other words an act dealing with the rights of authors. We are respectful of these rights. Every new exception included in the act is therefore for us a new infringement on the rights of authors. That makes a world of difference, in Quebec in particular, but especially in the arts community. This is an act the purpose of which is to defend their rights, but every time we include an exception, we take one of these rights away from them.

It is so much so the case that three measures contained in the bill will deprive creators of artistic content of $74.8 million. The non-modernization of copying for private use will take $13.8 million away from them. With regard to the exemption for education, I wish to tell you that non-respect of copyright is a very bad message to deliver to children and students. Indeed, because they are studying, they are authorized to not pay copyrights. I do not see how you are able to defend such a thing. Tomorrow morning, once the bill has been passed, we will be able to copy this beautiful book you have to our heart's content, using education as a cover. It could even apply to an automobile driving school.

In the case of the exception for education, we are talking about $40 million less, and in that of the abolition of ephemeral recording, the loss amounts to $21 million. Those three exceptions alone represent a $74.8 million reduction. The gentleman provided a very good description a little earlier of the "YouTube exception". It is indicated that it is for non-commercial use, but never before have consumers been granted user rights that do not even require the consent of the author.

The fact that statutory damages are capped at $20,000 in the case of musical works makes no sense at all. In other words, any individual wishing to steal a musical work simply has to find $20,000 and wait for charges to be laid. The digital lock, however, is a measure that a large enterprise truly needs, especially in the game software industry. But if a person circumvents a digital lock, he or she is subject to criminal sanctions of a fine of $1 million and a term of imprisonment of five years. Do you see the difference? When you infringe on rights relating to a musical work, the penalty is $20,000, but when you circumvent a digital lock, it is of $1 million. This provision of the bill is clearly advantageous for big business. It is a double standard.

This imbalance comes into play at several levels. Given that I wish to provide you some time to react—and, in any event, there will be a second round—, I will give you the floor right away.

● (1605)

[*English*]

Prof. Michael Geist: Thanks. I would respond with two things. One is to reiterate the fact that the notion there are people out there who will be able to make any kind of copying and claim it's for educational purposes, and that it stops there, is fundamentally not what the bill says nor what the law is. The law says they can start with that, to claim that it's educational, but it will still be subject to a fairness analysis. In fact, I reiterate that the Federal Court of Appeal looked at this specific issue around educational copying this summer —areas where it was already included as a category—and determined that compensation was still due. This notion that all of the revenues disappear is fundamentally at odds with the law.

I'd also like to comment on this notion that any exception is anti-creator. With all due respect, I simply think that's not the case. Certainly we can well see that exceptions like parody and satire are designed specifically for creators; they are designed to ensure that those who engage in the creative process have the ability to do so without fear of lawsuits. The same is true for some of the other areas. Even in the UGC, the remix type of exception, we are talking about a new generation of creators, the people I think we want to embolden and allow to go ahead and create.

Sometimes the Copyright Act as currently constructed erects barriers to that creativity. Some of the exceptions we see within this legislation, as well as the digital locks, which themselves can be a major problem for creators in their desire to create, ultimately have to be addressed as well.

[*Translation*]

Mrs. Carole Lavallée: With regard to the exception for education, officials from the departments of Canadian Heritage, Official Languages and Industry came before us this week and did not deny the fact that there is an exception for education. They told us that one of the things that will have to be done is define what we mean by the term "education".

Notwithstanding what you are telling us, they said that there is indeed an exception for education.

[*English*]

Prof. Giuseppina D'Agostino: To follow up on that, I would like to see—and this stems from my opening remarks—some clarity as to what we mean by education. It's a very broad term. Yes, we have research, private study, criticism, and review, but those have been subject to the test of case law. We are going to go back to the drawing board and now put the term “education” to the courts to decide when we could be doing so in this room.

Mr. Barry Sookman: Madame Lavallée, I certainly agree with a lot of your sentiment, particularly the sentiment that talks about *droit d'auteur* and how important that concept is in Quebec. Sometimes in English Canada we unfortunately don't perceive it that way. Your point is a very valid one, and the *Bureau du droit d'auteur* mentioned that point.

You can see that concept very significantly as it plays out in the UGC exception, where the fundamental concept of an author being able to control how the work is used, what it's used with, and what it's associated with, is absolutely fundamental. In this case this exception is not just about little mashups; it's about a lot more, which would have really important ramifications on *droit d'auteur*.

On your other point, I also agree that as the exceptions are drafted, it would lead to a lot of uncompensated copying, but the format shift, for example, is drafted in a broad enough way that it would permit people to side-load from other people's computers. That could not be intended. It would permit one person to copy their entire iPod or computer onto somebody else's computer, which again is not intended. The intention must be to copy only for the person's own private purposes, not for somebody else's private purposes.

Lastly, in relation to statutory damages, you raise a really good point about the interrelationship between statutory damages and behaviour. What this bill does with respect to statutory damages is tell people they can copy as much as they want onto their computer or onto their iPod. It doesn't matter how many times, because the most they're going to be liable for is $5,000. Once you're copying, why not copy as much as possible?

Our trading partners have tried to send signals indicating that this kind of behaviour is not appropriate. The statutory damages that we have give exactly the opposite message to consumers, which is that you don't need to buy legally. You might as well just load up, because if they catch you, there will be a cap.

● (1610)

The Chair: Thank you very much.

Mr. Angus, we have about five minutes left. We're going to leave it to you if you wish to have us suspend now. Do you mind splitting your time?

Mr. Charlie Angus (Timmins—James Bay, NDP): I'll split my time, Mr. Chair.

The Chair: Okay. We will go to Mr. Angus for seven minutes.

Mr. Charlie Angus: Ms. D'Agostino, I was interested in your recommendation on fair dealing, but I have to admit that I wasn't really quite sure what it was.

The education right has been defined by the Supreme Court, so it would seem to me incumbent upon us to address the education right as defined by the Supreme Court within legislation, but to make it clear enough to prevent a corporation from doing training and saying that it's education or prevent a private for-profit company from saying that it's just for education. We should be able to find language that defines things so that we're not talking about people pillaging entire libraries and textbooks and saying that it's fair dealing.

What is the specific language that you would provide to us that would allow for that clarification?

Prof. Giuseppina D'Agostino: Well, it would leave some flexibility in the framework for the government through, essentially, regulation. We have established an entire process to formulate the exact specificity needs of what we mean by education.

For instance, one question I have is whether we include course packs for universities. That's something I'm still not clear on. There is also the example I raised about the school for English as a second language; I'm not clear on that either.

If we look at CCH and the six factors, in a sense I don't think the provision would be broadly interpreted, because there is a safety net with the CCH factors. At the same time, it's still a feeling I have and not a certainty. What I would like is a bit more certainty and a bit more evidence amassed to have a more concrete, evidence-based approach. That's why I'm not really comfortable with the way it is now. I think and I sense that there is something we should be doing. If we put in a term like that, I just don't know if it's going to really achieve what we're trying to get at. If there is something we should do, then maybe we should look at it a bit more carefully.

Mr. Charlie Angus: Okay. Thank you.

Mr. Geist, you and I were both at the event at McGill University at which Bruce Lehman, who wrote the DMCA legislation, spoke. Mr. Lehman shocked everybody, because he said he felt the DMCA had been a failure and urged Canada not to do what he had done.

Then he said something that I thought was very disturbing. He said he felt we were in somewhat of a post-copyright era, in that when millions of people just opt out of any respect for copyright, copyright has no place.

I personally don't believe that, but what concerns me in this bill is that people are going to do what they're going to do anyway. I've heard this from a number of people about the digital lock provision in proposed section 29.22's right to reproduce for private purposes unless there's a technological protection measure, and about proposed section 29.23 on time shifting unless there's a technological protection measure, and on education rights.

If people are ignoring the law, how do you enforce it? That's the question I've had: how do you force people to, for instance, destroy their class notes after 30 days? How do you tell them they can't keep a library? Once people see that as an irrelevant issue, then the whole legitimacy of copyright is undermined.

Do you believe it would be better for us to focus the bill so that there are clear rules about how copyright is enforced and how it's not enforced, so that if citizens have rights guaranteed under the bill, then those are their rights?

Prof. Michael Geist: There are a couple of things there. First, if it's a citizen's right and we're going to agree that something like time shifting or format shifting is appropriate and ethical and that the law should reflect that, then I don't think it's appropriate to say that the right can simply disappear by virtue of the existence of a digital lock.

If it is a right and reflects the ethics that I think many of us have, then it's appropriate to record a television show or format-shift a video. If that is in fact the case, then the law ought to reflect it, and the notion that it can be lost by virtue of a digital lock is fundamentally wrong.

Let me speak, though, on the enforcement side for a second. The issue of enforcement is an important one, because I think that in many ways digital locks punish the good guys. Those who would seek to infringe, frankly, are going to infringe whether there's a lock there or not.

Those who will respect the lock provisions are educational institutions, teachers, and students doing assignments. At the very beginning, they sign ethics documents about what is appropriate and permitted behaviour and what is not. If you're a researcher and you're putting forward a grant application that may involve some circumvention, you can't apply for that grant, because it violates the law. Putting forward lock provisions that are inconsistent with the other sorts of balance that we already have in the non-digital world ultimately punishes those who are seeking to abide by the law.

The truth of the matter—and I think this is what Lehman was getting at—is that the experience in other countries that have implemented these rules is that the digital lock rules are by and large ignored by the pirates and followed by those who want to abide by the law. What we're doing here is punishing those people.

● (1615)

Mr. Charlie Angus: Do you agree with the suggestion that has been put forward by some academics that the creation of this two-tiered set of rights, with digital locks being able to override rights that are guaranteed in other parts of the Copyright Act, will lead to a constitutional challenge?

Prof. Michael Geist: I think there's no question that we'll see a constitutional challenge. We've had papers from a number of academics who have made the case in an analysis of how copyright sits within our Constitution. The further away you get from copyright and the more you become more focused on what you can fundamentally do with your own property rights, the less this becomes about copyright per se.

When you have legislation that basically dictates what an individual can and cannot do with their own personal property—I'm not talking about someone who seeks to infringe, but about their own personal activity and their own personal property—and especially when we bring in things such as basic access controls, it doesn't sound to many people as though we're talking about copyright law at all anymore. It's now about personal property rights, and frankly, that's within the jurisdiction of the provinces, not the federal government.

Mr. Charlie Angus: Thank you.

Mr. Chair, how much time is there? I can stop now.

The Chair: I can give you another minute, and then your round will be finished.

Mr. Charlie Angus: Perfect.

Mr. Sookman, you mentioned the issue of the broadcast mechanicals. I'm interested in the issue because we have within the bill certain compensation rights that were in existence and to which creators and authors were entitled. Now they're being told they don't have those rights. I find that a strange decision by the government.

I was interested in the recent Dutch Court of Appeal case. In this case somebody said that authors had the right to be compensated even for illegal downloads, because the Berne three-step test said that if there's a right to compensation, that right still exists. It can't be taken away.

Do you believe there is an obligation over prejudicing the rights of the artist if we have existing compensation regimes that are now being made null and void?

Mr. Barry Sookman: Thank you for the question, Mr. Angus.

I hope at a later point in time I get an opportunity to address the other part of your question, which Professor Geist dealt with, because I don't agree with that.

Concerning this situation, I believe that artists are losing revenues, as you've said. The broadcast mechanical is an example.

Is this a constitutional violation? I think the answer is clearly not. Parliament has control over how it legislates with respect to copyright and, in my view, even with respect to TPMs it certainly would have constitutional control under the way the Constitution Act has been construed. As long as it rounds out a scheme with respect to copyright, there would be constitutional authority. There's no doubt that TPMs are there.

With respect to the broadcast mechanical, it's a question of policy: is it good or bad? I think a lot of people didn't see this one coming, frankly. I certainly think the rights holders didn't see it coming. Parliament can do it if they want, but whether they ought to do it is another question.

Mr. Charlie Angus: So they can do it without—

The Chair: Thank you very much. We're going to have to suspend now.

We will come back 15 minutes after the vote numbers are announced, with the indulgence of our witnesses. Thank you very much.

The meeting is suspended.

● _____ (Pause) _____

●

● (1645)

The Chair: I call this meeting back to order.

In this first round we have one more seven-minute question period. We go to the Conservative Party.

Go ahead, Mr. Lake.

Mr. Mike Lake (Edmonton—Mill Woods—Beaumont, CPC): Thank you, Mr. Chair.

Thank you to the witnesses for being here today. It's a good start to our hearing from witnesses.

I'm going to start with Mr. Geist. This is just a quick question before I get into the theme of my other questions.

Just for the record, I believe you're a creator who benefits from the economy for your own work. Is that correct? Can you explain how that might work for you personally, as a creator?

● (1650)

Prof. Michael Geist: Sure, absolutely.

As do many academics, I write and I publish. This book is one example, but there are a number of others.

I'm practising what I'm preaching in the sense that the approach I take is to have this book available in print form and also to have it available free to download through a Creative Commons licence. Our publisher—a mainstream legal publisher, Irwin Law—has found that it's actually a viable commercial model to have the book available for purchase as well as available for free download. They find they actually are in a position to sell more books because they're adopting that open model, and that would be true, I think, for a growing number of people.

What we're talking about is a range of different models. Some of them can be closed and some of them can be open. All of them, at the end of the day, still respect copyright, and certainly I do with some of the choices that I make with my own writing.

Mr. Mike Lake: All right. I imagine that the important thing is that you, as the creator, are free to choose whether you offer it up for free or whether you charge for it and can recognize some revenue from it.

Prof. Michael Geist: It's absolutely essential that creators get to make those choices, but copyright also sets some limits on some of those choices—limits in the sense that there are exceptions. There are user rights that I, as a creator, don't have the right to stop someone from exercising. That's what that balance is all about. Of course I get to choose the business model and I get to choose the publisher that I use. I get to choose a range of different things, but at the same time, once someone has purchased this work or has accessed this work in an appropriate fashion, they have a range of rights that kick in as well, so when we're talking about striking an appropriate balance within copyright, that balance also includes respecting both the creators, who are creating, and at the same time the rights that the users have, and the limitations, at times, that exist for some of those creative rights.

Mr. Mike Lake: All right.

I'm going to transition a little bit here. We've had more submissions and meetings on this piece of legislation than virtually anything any of us have experienced. There has been much positive commentary, but I suspect that what we're going to hear from witnesses when they come before the committee is what they would change.

I'm interested in hearing succinctly what you like about this bill. What are the best aspects, the most important positive changes in this piece of legislation?

I'll start with Mr. Sookman and move from right to left, in this case. If you could be fairly succinct, that would be great.

Mr. Barry Sookman: Thank you, Mr. Lake. I appreciate it.

The first thing to mention is the fact that we have a bill and we're at the committee. It really is essential for the Canadian economy that we move forward with this bill and get something that can be passed. I can't underestimate how important it is for Canadian business, Canadian jobs, and Canadians who want to establish new business models and go forward, so the fact that we're doing this is good in itself. The bill is a start to that.

In terms of the provisions, there are a number of them that I'll mention first. First, the fact that we're implementing the WIPO treaties is a very positive development. There are some who have said the WIPO treaties are outdated; that is not the case at all. Those are forward-looking treaties. They are being used successfully by those of our trading partners who have implemented them.

The technological protection measure provisions are absolutely essential for underlining new business models that exist around the world. They simply cannot be undertaken without legal protection for TPMs.

The other provision I'll mention, simply because of time, is enablement. I think the presence of that will send a clear signal that pirate intermediaries in Canada cannot stay here. This is not a place where these wealth destroyers will be welcome. Assuming those are tweaked appropriately, this is a very important aspect of the legislation.

Mr. Mike Lake: All right.

Pina, would you comment?

Prof. Giuseppina D'Agostino: I welcome that question.

I like where we are in the process and that we are here having an open discussion on important issues.

I also like the way the government shows in the bill a true struggle to achieve balance. At least the struggling is evident from the different provisions, and it's clear from the bill.

As well, photographers are given the same rights as other creators. There are also more rights for performers, and an exception for persons with perceptual disabilities, so I like those aspects.

Mr. Mike Lake: All right.

Mr. Geist, what is your comment?

Prof. Michael Geist: I'm also happy that we're here at this point in time. We're all in agreement there.

I think the best provisions are the ones that genuinely try to strike a compromise, which becomes so essential in copyright. I think we see it in the Internet service provider provisions with the notice-and-notice approach. I think we see it with respect to fair dealing. I think we see it on statutory damages when we target the clear cases of commercial piracy and have very tough penalties associated with that while at the same time recognizing that multi-million-dollar lawsuits against individuals make no sense whatsoever.

The places I wish I could say the bill were better, of course, relate to both the digital locks and those new consumer provisions, because I think that in a sense the bill gives on the one hand and takes away on the other hand. It's certainly appropriate, I think, to move in the direction of things like format shifting, time shifting, and backup copying, but to make all of those conditional on a digital lock is to give on the one hand and immediately to take away on the other hand.

● (1655)

Mr. Mike Lake: Unfortunately my time is going to be short, so I don't know if all of you will get a chance to answer this one, but I'll start with Mr. Sookman again.

Is there anything you've heard from the other witnesses at the committee—and I'm not looking for a fist fight here, or anything like that—that you maybe don't agree with?

Perhaps the others will get time later in the committee meeting to answer that as well.

Mr. Barry Sookman: Thank you, Mr. Lake.

I'd like to respond to a couple of comments that Professor Geist made in response to Mr. Angus's question. I do agree with the notion that we need very clear framework rules, but I fundamentally disagree about what those rules are. As well, I do not believe that a person who buys a product subject to a digital lock should necessarily simply have the right to circumvent that digital lock, and I don't think using the “trumping” language is actually appropriate.

The TPMs on products are there to support business models, and if you look around the world, those business models are subscription business models, rent-to-own business models, and owning business models that cannot be sustained without legal protection for TPMs. If a person could simply acquire a product under various terms and then circumvent the TPM, there would simply be no incentive to launch those products, or, if they were launched, there is no reason to think they'd be provided at different price points that would be beneficial to consumers. Rather, what you'd have is businesses thinking that they had to price a product for the maximum possible use, which would be anti-consumer.

The last point I'll make on that, if I may, Mr. Lake, is that this isn't only about consumers. This is also about Canadian businesses and jobs, and every time an uncompensated copy is made, as Professor Geist would advocate, that's somebody whose pocket is being picked or whose job is being lost. That kind of policy, I submit, is a real problem.

Mr. Mike Lake: I think Mr. Geist is going to want to comment on that, but I think the chair is going to cut him off.

Mr. Del Mastro will give you time, Mr. Geist.

The Chair: Okay. Thank you very much.

We're going to move now to the Liberal Party. Mr. McTeague, you have five minutes.

Hon. Dan McTeague: Thank you, Chair, and thank you, witnesses, for being here. We've long anticipated your arrival—in my case, at least, it's been since 2005. It's not as long as Mr. Geist, but certainly I have taken an interest in this area.

Recently there has been news about The Pirate Bay, the world's largest illegal peer-to-peer file-sharing BitTorrent website. You'll find this is a theme I raised with officials last week.

The Pirate Bay recently lost an appeal of a copyright conviction in Sweden. The court, as you know, found that "The Pirate Bay has facilitated illegal file sharing in a way that results in criminal liability for those who run the service". The three site founders were sentenced to prison and fined some $6.5 million U.S., I believe.

In 2008, prosecutors said that The Pirate Bay had 2.5 million registered users, peaking at more than 10 million users simultaneously downloading files, and was making $4 million a year from site advertising. It's clear that the site was, if you will, a high-volume and very lucrative business.

I'd like to ask all three of you, if I could, how you see Bill C-32stopping, if indeed it does at all, sites similar to The Pirate Bay—sites that facilitate the mass distribution of unauthorized copies of works—from being able to operate here in Canada.

I'll start with you, Mr. Sookman, and work my way back.

Mr. Barry Sookman: Thank you very much, Mr. McTeague.

That's a very good question. I think the enablement provision would be one of those tools that would help achieve a similar result in Canada. If you look at The Pirate Bay, The Pirate Bay is not directly liable for infringement. What The Pirate Bay does is facilitate infringement by others. The important point is that with a little tweaking the bill will, hopefully, have sufficient teeth to put a Pirate Bay out of business in similar situations in Canada.

The second thing is that in the case of The Pirate Bay, the "making available" right was also used to help prove the fact that files were being shared, and that was helpful.

Of course, in a Canadian situation we have problems similar to The Pirate Bay. We have isoHunt, which is the second-largest BitTorrent site in the world. It is the largest in Canada. We have seven other BitTorrent sites operating in Canada, and many leech sites and other sites. The Pirate Bay is a good litmus case to think about. We have those problems in Canada that need to be addressed, and the enablement provision would very much help to do that.

● (1700)

Hon. Dan McTeague: Ms. D'Agostino, would you comment?

Prof. Giuseppina D'Agostino: Currently we have a good signal in the bill, a policy framework, to signal against that type of conduct, that infringing behaviour. It leaves it very much in the hands of litigation, in a sense, to resolve exactly what is meant by a service designed primarily to enable acts of infringement. We have case law there, and I'm hopeful that the law will be respected.

Hon. Dan McTeague: Thank you.

What would be your comment, Mr. Geist?

Prof. Michael Geist: I think that the enablement provision is helpful in that regard. I don't have a problem with it. I think it needs to ensure that we don't have unintended consequences. At the same time, if those are tools that can help in terms of targeting some of the bad actors, I think that's just fine. I think it's appropriate.

I do think, however, that it is important to recognize that some of those same tools already exist within the Copyright Act. One of the problems we have faced has been the reluctance of some of the rights holders to go after those sites in the first place. There have been a couple of instances in which they have targeted Canadian-based BitTorrent sites, and those sites have stopped. There is one case now involving isoHunt. It's quite clear that those groups would be quite anxious to, or are prepared to, make the argument that Canadian copyright law does not, as it currently stands today, permit certain kinds of authorization of infringement activities.

It's not just about MPs crafting laws to give new tools. It's also about rights holders exercising some of those rights against those particular bad actors, recognizing that what we want to target are the commercial cases of infringement and that by and large we want to leave the non-commercial individual personal property issues aside.

Hon. Dan McTeague: I get that, Mr. Geist. It's okay that people should take these matters to court and go through the process of standing up for their rights, but it would appear that the very existence of an isoHunt in Canada is problematic and is very much the result of what appears to be a legislative holiday for companies and other BitTorrent sites.

Let me go to the question of statutory damages, because I think we raised this a little earlier. I think a number of you had something to say. In your case, Mr. Geist, you suggested that we propose a $5000 cap on liability, and I think your quote was that it represents a good compromise. Others have called this cap something that is in fact a licence to steal.

I'm wondering—and this is somewhat connected to the previous question—if what you have here is a situation that might actually encourage people. They could say that the one-lump-sum approach allows them to do it severally, manifestly, and as often as they want. They'll take the risk on that $5000 because they can probably make a lot more money commercially, or they'll do it for other reasons, such as notoriety.

I'm worried about the signal that comment might send to Canadians and file sharers, which is that this kind of low-risk approach to the probability of conviction, as well as a low fine, would defeat the very purpose of ensuring the balance that you claim this bill has.

The Chair: Please give a quick answer.

Prof. Michael Geist: The quick answer raises at least two points. First, statutory damages are relatively rare. Most countries don't have them. We're generally one of the exceptions rather than the rule.

I think this notion that $5,000 is going to be viewed by the average Canadian as a licence to steal is completely out of touch with reality. For most Canadians, $5,000 is an awful lot of money. If anything is a dangerous signal, it is a potential multi-million-dollar liability for individuals for non-commercial infringement. That's what we have in the United States right now. There are more than 30,000 cases in which individuals have faced the prospect of a multi-million-dollar liability—losing their homes, losing all of their savings—for sharing a few songs. I think that's a fundamentally wrong, unjust message to many individuals. We want laws that target those who enable the infringement. We have penalties that are stronger, in terms of financial penalties, and statutory damages that are larger than those of any other country in the world, because many of them don't even have statutory damages.

To send a message that an individual Canadian is potentially on the hook for millions of dollars is the wrong message, and to suggest that somehow $5,000 is just pocket change and won't deter me from sharing files to my heart's content is out of touch with the reality for most Canadians, who would look at $5,000 as being an awfully expensive penalty to have to pay.

● (1705)

The Chair: Thank you very much.

[*Translation*]

Mr. Cardin, you have five minutes.

[*English*]

Hon. Dan McTeague: I think we have another response here.

Mr. Barry Sookman: Can I answer that very quickly?

The Chair: I don't have a problem with that.

Is that all right with the committee?

Mr. Mike Lake: Mr. Geist didn't get a chance to respond to my comments either. I think if they want to bring it up in the next round....

The Chair: We'll come back to you on that.

[*Translation*]

It is your turn, Mr. Cardin, for five minutes.

Mr. Serge Cardin (Sherbrooke, BQ): Thank you, Mr. Chairman.

Lady, gentlemen, welcome.

I wish to ask you if we might be provided a copy of your brief or of your thoughts, all of your thoughts, relating to Bill C-32. You know that in the context of a committee such as this one, you do not have the possibility to express yourself completely. It would therefore be greatly appreciated.

I would like to give you the opportunity, Ms. D'Agostino, to express yourself further, to go into the matter more in depth. You opened the door earlier to a discussion with regard to adequate compensation for the works of creators, and you also expressed the desire that someone invite you to pursue this reflection. I would like to hear your views on this matter.

[*English*]

Prof. Giuseppina D'Agostino: Sure, I'll do that with pleasure. Thank you very much.

Perhaps I might start this comment by picking up on a question that Professor Geist was asked and his comment about the creator's choice.

Of course there are different models that are evolving, in large part due to the technologies that are enabling these, but sometimes authors have no choice. We see litigation on this. There is, for example, the Robertson case, which is before our courts. There are standard-form contracts that are unclear and that are very much in place, and authors are forced to sign those. This is very much the case for freelance authors, because we do not currently have a copyright framework that is able to address those issues.

Some of the provisions that we might seek in a creator-friendly act, if you will, are some that we see more in the civilian jurisdictions. Quebec is an example, and I've written about this. I have a book that just came out, called *Copyright, Contracts, Creators: New Media, New Rules*, in which I discuss and itemize and study the issue, and I look at the copyright contract issues that might help creators.

In a sense, the copyright is as good as the piece of paper it's written on. If creators lose the ability to have control over their work, then their copyright really is worthless, so there need to be more robust provisions in the Copyright Act to animate those rights, and those would relate to the copyright contract issues.

In civilian jurisdictions there is a litany of terms. I'll just list those. You have them in Quebec, and in continental Europe there many different provisions, including contract formation and interpretation rules; purpose-of-the-grant rules; rules on use, scope, and duration; strict interpretation rules; and remuneration clauses. That's all across continental Europe. These are things we do not have here, because there is, in a sense—and this is the balancing that goes on—freedom of contract in the common law. It is believed that parties are free to contract, but we don't see this happening for all creators.

[*Translation*]

Mr. Serge Cardin: I would like to come back to the levies proper. A poll published in January 2010 said that 71% of Canadians are of the opinion that the present 29¢ levy on blank CDs is fair for consumers, whereas 71% of Canadians argue that the levies on MP3 players and iPods should be of $10 to $20. We know that thousands of songs can be copied through these devices.

The conservatives clearly call these things "taxes", but we prefer to call them "levies", which are in fact compensation for the artist for his or her work.

What is your position with regard to levies that could be required of the owners of MP3 players and iPods? If we enforce a $10 to $20 levy, as was suggested in the poll, given that we are talking thousands of songs, it would not be much, considering also the price of these devices. What do you think of levies that could be applied to MP3 players and iPods?

● (1710)

[*English*]

Mr. Barry Sookman: Thank you very much, Mr. Cardin.

With respect to the terminology, I can actually see both sides of that question. When somebody buys a BlackBerry or an iPod at Future Shop or wherever, an amount is added. Is it a tax? It has an attribute of having an extra amount.

Looking at it from the creator's side, they're looking to be paid a royalty, so there are two sides to it: on the one hand, an amount is added; on the other hand, an amount would go to the creator.

In terms of the levy, I assume you're asking me this question in my personal capacity. My own view is that setting a good marketplace framework is the best approach to this. I don't believe a levy would solve the file-sharing problem. A levy may play a part, but it's certainly not the answer. The answer is good marketplace rules whereby creators can have innovative business models and hope to be able to innovate.

[*Translation*]

Mr. Serge Cardin: It is a little bit as if you were saying that the manufacturing of the iPod cost money. It is as if we went about telling the people who worked in the manufacturing of iPods or MP3 players that they would not be entitled to their remuneration.

In order for people to receive royalties, are there other means than requiring a said amount for every iPod purchased? In the end, we must find tools to enforce levies, which are creators' remuneration. Would you have any suggestions in this regard?

[*English*]

Mr. Barry Sookman: Mr. Cardin, I agree with you that this is all about ensuring that ultimately artists get paid and are rewarded for their work. I think everyone would have to agree that uncompensated uses are detrimental everywhere.

My own view is that we do a number of things. The first thing we do is to get rid of the wealth destroyers, who result in a lot of uncompensated copying. Second, we create rules such that people understand that the proper norm is not to do illegal copying; the proper norm is to buy from iTunes or some other legal marketplace. Then there's compensation through those channels.

The next is to send those signals through statutory damages. If you look around the world, you could take Britain as an example. Britain does not have a private copy levy. Britain decided that a better approach would be not notice and notice, but a notice with a potential for there to be a sanction—not that anyone would ever want to have a sanction, but the point is that studies show that if people know they could get a notice and there could be a sanction, between 70% to 80% of them simply stop. You're never going to get the ultimate hacker to stop, but I don't think we design laws to deal with the end case.

The Chair: Thank you very much, Mr. Sookman .

We're going to have to move on to Mr. Del Mastro for five minutes.

Mr. Dean Del Mastro (Peterborough, CPC): Thank you very much, Mr. Chair.

This is a fascinating conversation, but I think there's a lot of confusion. First I'd like to respond to some of what I've heard, and this isn't my question.

Mr. Sookman, it seems you've indicated that the intent of the bill is bang on what you're looking for, especially in relation to the BitTorrent sites and so forth. You're looking for some wording changes to tighten the bill so there aren't any loopholes. Perhaps you could recommend in writing to the committee where you'd like to see the amendments you've spoken about, specifically with respect to enabling infringement.

Ms. D'Agostino, just to shorten a little bit what you said, we need to define “education”. If you have a recommendation as to how the bill might do that, I'd love to see it.

Mr. Geist, I still feel there's an awful lot of misunderstanding on the opposition side with respect to what fair dealing means and what they are proposing, which sounds a lot more like free dealing. They are indicating that if something is fair dealing, therefore it's all going to be free. For the benefit of everyone in the room, could you please explain the difference between fair dealing and what has been termed “free dealing”, which is what I think has been presented in some cases?

● (1715)

Prof. Michael Geist: Sure.

The notion of free dealing is one that is foreign to our copyright law, and indeed it's foreign to most copyright laws that I'm aware of. It is the notion that someone has the unfettered right to copy without any sort of compensation. A rights holder can choose to make their work available in that fashion, but you wouldn't typically find that in a copyright law.

Our law is no different. What our fair-dealing provision provides, as I mentioned at the outset, is essentially a two-stage test. It first identifies the kinds of specific categories that may qualify as a potentially fair dealing. Other countries have done away with this altogether. For example, in the United States there are no categories at all. Anything can potentially be, in their terms, a fair use. In Canada you first actually have to qualify for one of those categories. The changes within Bill C-32 expand the categories by establishing that parody, satire, and education would be new categories, but, critically, there is a second step, and this would be true for the United States and would be true here as well.

That second step is a full fairness analysis to determine whether or not the copying itself actually is fair. It is a six-part test that the Supreme Court of Canada has identified to take a look at how much is being copied, what alternatives exist, and what the economic impact or the impact of the person who is engaged in those sorts of copying is. That's the test that's used. There's a similar test in the United States.

Now, no one would ever ague that because the United States has fair use with no categories, any copying of any sort is perfectly permissible in the U.S. There are clearly limits to fair use, limits that are based upon this test.

Precisely the same situation is true here in Canada, where there are limits established by the courts. You heard me suggest that if there are real concerns about this, we could codify it within the legislation. What those limits ensure is that we are not talking about tens of millions of dollars in losses in unfettered copying whereby people will simply say, “I qualify for a category, so I can copy to my heart's content.” They will still have to ensure that the copying itself is fair.

Mr. Dean Del Mastro: For my second question, I want to go back to something Mr. Cardin raised, which is the issue of a royalty. A royalty is another way of saying “tax”, since it was money that used to be collected for the royals, and later it became known as a tax. On the issue related to what we've deemed “the iPod tax”, I'd like all of your comments, because I think this debate is taking over the much larger issue, which is re-establishing a marketplace. That is where artists and creators actually make the bulk of their money, and that is where they're really getting hurt.

Mr. Sookman, would you say it's more important—and I'll allow everybody to come in on this—that we move forward on this bill re-establishing a marketplace and shutting down the pirate sites, or that we get bogged down in a fight over whether there should be an iPod tax?

As well, Mr. Geist, you can still comment about Mr. Lake's question, if there's time.

Mr. Barry Sookman: Thank you very much for the question.

There are a lot of issues that are not in this bill. If you looked around the country, people would say that they'd asked for things in the consultations, but they're not seeing them in the bill. If we took every one of those and said that we can't move forward on copyright until we get everything in, we would go nowhere.

I acknowledge that the issue of the levy is important to some actors, but that said, my view is that we need to move forward. My view is that we need to solve clear and pressing problems that currently exist and create a marketplace framework. My belief is that we should do that and that this bill should not stall and die.

Prof. Giuseppina D'Agostino: We do need to create a vital market framework, and with it we need the provisions to sing loud. We need clarity and understanding for all Canadians. Currently there needs to be some tweaking of the provisions outlined in Bill C-32 as it's configured, but we need to move forward.

Prof. Michael Geist: I think there's a lot of attractiveness to the concept of a levy. I think the problem to date has been that many of the proposals, with all respect, haven't addressed a lot of the complications that arise in the context of a levy.

There are problems of marketplace distortion in that you're going to have consumers buying some of those same products outside the country. The result will be that we will lose tax dollars, retailers will get hurt, and the artists won't get anything at all. I think there are problems of distorting the actual prices of some of these products, if you use the model that we have with CDs. I think also that with the exception of the songwriter association's proposal, which I think has the most merit as a starting point for discussion, there is a little bit of bait and switch that takes place here, with all respect. The argument is that since there's a lot of file sharing taking place, we need to compensate it by way of a levy, yet outside of the songwriters, I haven't seen any group acknowledge that if we were to have that levy, the file sharing they are decrying would be legalized.

I don't see how you can have your cake and eat it too. If we're going to propose establishing a levy to compensate for the copying that takes place—by and large, as we all know, through file-sharing networks—then the quid pro quo quite clearly ought to be full legalization of that copying, but I have not yet seen that come forward as a proposal. Usually it's just that we want to port the same levy to other devices.

● (1720)

The Chair: Thank you very much.

We're going to have to wrap up the second round. We have just a few minutes left. With the support of the committee, I'd like to give the witnesses a moment or two to finish up any points they were in the middle of.

Go ahead, Mr. Geist.

Prof. Michael Geist: I'll take the opportunity to respond to Mr. Sookman's earlier comments in which he suggested I'm advocating all sorts of free copying. I hope you'll agree that over the last couple of hours that's not what you've heard. I'm calling for a balanced approach to copyright, not one in which wild, uncompensated copying is taking place.

It's also important to talk to the specific business issue Mr. Sookman raised. He's talked about the reliance that some businesses have on things like digital locks. Let's also recognize that a large number of businesses are reliant on the absence of digital locks, or at least rely on balance within those digital lock rules. That's why you have various groups—the CADA and the BCBC, and other groups that may ask to appear before you—that have expressed concern about the way the digital lock rules themselves are framed within the bill, because they believe it puts them at a competitive disadvantage.

Consider just one example. I was talking earlier with Mr. Rodriguez about my iPad, which I mentioned my kids love, and so far I am a satisfied customer. We all know competing devices are going to come onto the market, including one from one of Canada's most important technology companies, Research In Motion. If I'm going to switch off the iPad and go to the PlayBook, consider what happens if the format shifting provision that exists right now continues to have that digital lock provision in there. All the investments I've made in electronic books and movies are confined to a specific format on the iPad. Unless I pick that digital lock, which I'm not now entitled to do, I can't switch it over to the PlayBook. In fact, what happens is that the cost to consumers in switching isn't limited to the device; it's now the hundreds or potentially thousands of dollars that they've invested in content. That hurts not just the consumers; it also hurts some of our best and biggest companies in terms of their ability to compete in the marketplace.

The Chair: Thank you.

Do other witnesses have anything to add?

Mr. Barry Sookman: Mr. Chair, thank you for the opportunity. I'll just make a few points.

The first is that I think Professor Geist is absolutely talking about free copying. When it comes to the educational exception, one can copy up to a substantial part without infringing. Anything over or above that would normally be subject to compensation authorization. If you introduce fair dealing for education, the fairness factor is free, uncompensated copying.

The second is the format shift exception. If it's opened up so that anybody can do format shifting even when they buy something with a digital lock, that is significant, uncompensated copying that will only result in difficulties in the marketplace.

The assumption behind Professor Geist's remarks is that there is a problem. When I buy a CD, I don't have a problem. I can put it onto an iPod. It simply isn't a problem today. These laws have been in place in Europe for over a decade, and the problems that he's articulated simply don't exist.

The other thing to mention—and we haven't focused on this—is that because of the way the TPMs are structured, there are not only significant exemptions but also very significant regulatory powers that the government has to deal with any problems: first, it can deal with anti-competitive conduct; second, it can create new exemptions wherever they're needed, and that includes exemptions that might be needed to exercise fair-dealing rights, which include research private study and instruction in an educational context; third, the bill contains provisions that let the government also require copyright holders to make works available in a format they can use if their exceptions are things they can't exercise.

There isn't a problem and there's not likely to be a problem, but in the event that there is one, they contemplate that it can be solved because of the way the TPM provisions are structured.

I can tell you that the structure we have is better than the structure in the U.S., which only has rule-making. It is better than in the EU, which only permits a power to make works available. This is a combination, and with all these things in place, I just don't know what the big concern is.

● (1725)

Prof. Giuseppina D'Agostino: I'd like to re-emphasize a few points and expand on others.

It's all about balance, right?

When we look at rights holders' and creators' rights, my concern is that if we don't do some tweaking to the existing exceptions that are now in the act, there's going to be an unintended erosion of rights holders' and creators' rights.

I have mentioned fair dealing and user-generated content. On fair dealing, one thing I haven't talked about is my own analysis of the six factors. When you line up Canada with respect to the U.K. and the U.S., you see that the court says there are more or less six factors, and there could be more. At the same time, in terms of the effect of the dealing on the works—meaning the actual market considerations, the market substitute—the Supreme Court of Canada says that it's not the only factor, nor the most important.

We know that this is not the case in the U.K. and not the case in the U.S. What we have in Canada with CCH is a broad and liberal interpretation of both the actual purposes and the fairness factor. Left unchecked, the way it's configured now means that when you compound education plus CCH, you will have something broad, unless we are able to itemize exactly what we mean. I put forward one suggestion on how to do that and I'm happy to also put it in writing for your consideration.

On the UGC, something we might think about is transformative uses. I have before me one of our Osgoode students, who is taking a stab at drafting a provision on transformative uses so that you have a new work—a different purpose, an identity, a message, a new context—that can help tweak and fix that provision.

The Chair: Thank you very much to our witnesses. Thank you for your informative presentations.

Go ahead, Mr. Lake.

Mr. Mike Lake: I have a quick point of order.

Several changes were suggested by the witnesses over the course of the meeting. I would like to officially ask the witnesses to submit potential amendments to the committee in their own words so that we can review those proposed amendments.

Could you do that, please? Thanks.

The Chair: Thank you again to our witnesses. It was very informative, and I know the members of the committee appreciated it very much.

This meeting is adjourned.

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