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Tuesday, March 8, 2011

Chair

Mr. Gordon Brown

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● (1105)

[*Translation*]

The Acting Chair (Hon. Maxime Bernier (Beauce, CPC)): We will now begin the 17th meeting of the Legislative Committee on Bill C-32. Two witnesses are here to help as we continue studying this bill.

Before we hear from the witnesses, I will give the floor to Mrs. Lavallée.

Mrs. Carole Lavallée (Saint-Bruno—Saint-Hubert, BQ): Thank you very much, Mr. Chair.

I would like to talk to you about the list of witnesses.

This morning we have the honour and pleasure of receiving two key witnesses from 11:00 a.m. to noon. However, last week, at the last meeting, there were six people. At the last minute, the chair decided not to receive another person. There would have been seven witnesses and that would have made no sense.

There are representatives from organizations who are representing tens of thousands of artists and who have concerns about Bill C-32. Organizations are complaining that they have not been invited. This morning, we would have had time to hear from other witnesses, because, in the second part of the meeting, we just have to look at a notice of motion and that might only take five or ten minutes. Yet, this morning, we are only going to hear from two witnesses.

A number of organizations have contacted me to let me know that they have not been called to appear. When they call, they are being told that they are not on the list yet and that they might never be.

Mr. Chair, one of those organizations is the Union des artistes. The Union des artistes (UDA) is one of the organizations representing Quebec's leading artists. It is chaired by Raymond Legault and it has 11,000 members.

Its representatives want to testify together with Artisti, which protects the rights of artists and has 2,000 members. UDA has initially asked for neighbouring rights and is also the founder of the current private copy system.

It is completely unfair that the Union des artistes is not on the priority list to be invited to participate in our work and that we cast them aside by saying that we don't even know if they are going to be invited to testify. It is simply unfair, Mr. Chair.

I would like us to rethink the witness list together and find a way to invite them. That was very clear when we sat around this table and made the decision. We were supposed to have two hours with two panels. In each panel, there were supposed to be three witnesses or three representatives from various groups.

That's not what we have here. When the representatives are against Bill C-32, we fill the room with six or seven different groups at the same time. When they are in favour of it, they are all alone. They are asked to come back or there aren't very many of them and they have all the time they need to express their ideas.

The Acting Chair (Hon. Maxime Bernier): Thank you.

Mr. Rodriguez.

Mr. Pablo Rodriguez (Honoré-Mercier, Lib.): Unfortunately, we have to deal with the whole issue here because there is no steering committee.

In response to Mrs. Lavallée's comments, I agree that it would be better to structure the meetings so that we hear from three people per hour, as was decided by the committee.

There are some major organizations, and Mrs. Lavallée has referred to them. The Union des artistes and Artisti are crucial for our work. They were on our priority witness list. We should have heard from the representatives of these organizations for some time now. We want to make sure that we will hear from them fairly soon because they are absolutely essential to the debate on Bill C-32.

Mr. Chair, as to the other point, I am respectfully addressing the clerk. We receive the documents much too late. I wonder why, since our witness lists have been ready for some time. We are very familiar with the issue. There's only one, and that's Bill C-32. It would be nice if we could receive the documents in advance.

The Acting Chair (Hon. Maxime Bernier): Great, thank you.

Before giving the floor to Mr. Del Mastro, I just want to provide the committee members with some information about the two previous comments.

The clerk has informed me that the Union des artistes should be here Thursday. He has been having trouble getting some of the people to appear. So the committee definitely wants to have the maximum of three witnesses per hour of meeting. The clerk and chair have made a note of that.

Depending on the people's availability, we are doing our best. This Thursday, we will for sure have representatives from the Union des artistes and other people.

Before proceeding and turning the floor over to Mr. Del Mastro, I just want the committee to take note of a letter I received this morning from the chair of the committee, Gordon Brown. I will read you a passage from Mr. Brown's letter. He says the following:

[*English*]

> Due to the passing of my mother this afternoon, please be advised that I will not be attending the meetings scheduled for March 8, 2011 and March 10, 2011. I hereby appoint the Hon. Maxime Bernier to act as Chair of the committee for these meetings.

[*Translation*]

On behalf of the committee, we are sending Mr. Brown our best wishes and our condolences during these trying times for him and his family. His mother was elderly. But I still hope everything will go as well as it can go for him.

I will now give the floor to Mr. Del Mastro.

● (1110)

[*English*]

Mr. Dean Del Mastro (Peterborough, CPC): Thank you, Mr. Chair. Certainly we'd echo your comments on that.

I would just point out to committee members that we have committee business scheduled in the second hour of the meeting, so certainly we could have these discussions then. I think a lot of this is simply a symptom of the committee's not meeting often enough, and many of the witnesses are also trying to game the system a bit. They all want to be last. That's why it's difficult for the clerk to schedule meetings.

So for what it's worth, I would just propose that we move to committee business. We can come back to these discussions once we've heard from the witnesses who are here today.

The Acting Chair (Hon. Maxime Bernier): Thank you.

[*Translation*]

Mrs. Lavallée.

Mrs. Carole Lavallée: I am very pleased to learn that UDA representatives will be here on Thursday. But I would like to tell you that the chair was not aware of that on Monday morning. I'm not sure he is any more aware of it now. Otherwise, I think he would have mentioned it to me.

[*English*]

Mr. Dean Del Mastro: It's verified.

[*Translation*]

Mrs. Carole Lavallée: I am obviously joining you in offering my condolences to our chair. Losing one's mother is never easy. I would like you to send him a heartfelt message so that he knows that our most positive thoughts are with him in this great loss.

The Acting Chair (Hon. Maxime Bernier): Thank you.

Mr. Angus.

[*English*]

Mr. Charlie Angus (Timmins—James Bay, NDP): Thank you, Mr. Chair.

I'll be quick.

We definitely want our condolences offered. Mr. Brown has been an excellent and very reasonable chair on our committee and his family of course should come before any of our business at this time.

That being said, I believe that our clerks are working full out. They've received the instructions of the committee. If there's a meeting where we don't have as many people for whatever reason, I'm not second-guessing their motives. I feel there's been a large witness list, and there are many competing interests, so I'm willing to just carry on with this meeting and get down to the business at hand.

[*Translation*]

The Acting Chair (Hon. Maxime Bernier): Thank you.

Mr. Garneau.

Mr. Marc Garneau (Westmount—Ville-Marie, Lib.): Okay.

Mr. Pablo Rodriguez: I would just like to extend my condolences to Mr. Brown and send him my best wishes.

The Acting Chair (Hon. Maxime Bernier): Thank you, Mr. Rodriguez.

We are now going to hear from our two witnesses. As Mr. Del Mastro said, we are going to deal with the committee business and Mrs. Lavallée's motion during the second hour.

I will now turn the floor over to our two witnesses, David Fewer, Director at Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic, and Russell McOrmond, as an individual.

[*English*]

We will start with Mr. Fewer for five minutes and follow with Mr. McOrmond.

You have the floor, Mr. Fewer.

Mr. David Fewer (Director, Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic): *Merci beaucoup*.

CIPPIC is the Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic. We are a technology law clinic in the Faculty of Law, housed in the Centre for Law, Technology and Society at the University of Ottawa. Our mandate is to advocate for balance in policy- and law-making processes and to provide legal assistance to under-represented organizations and individuals on matters arising at the intersection of law and technology.

CIPPIC has participated in policy debates around copyright since our founding in 2003, with a view towards ensuring Canadian copyright law maintains a balance among the competing interests of authors, owners, distributors, consumers, downstream creators, and innovators.

Thank you very much for inviting me here.

In practice, our advocacy has involved us in representing consumer interests and also creator interests on various files. For example, some of our current work includes acting with the Documentary Organization of Canada, the documentary filmmakers, in assisting them in preparing guidelines for working with fair dealing. We work with Canadian independent authors on the Google books settlement, which is a large class action that involves authors all over the world and is taking place in the United States. We are working with the Songwriters Association of Canada in supporting their efforts to get compensated for unauthorized peer-to-peer file sharing.

These efforts have provided us with I think a nuanced view about copyright. I'm hoping that view informs your deliberations.

I'd like to begin by complimenting this government on Bill C-32. This bill demonstrates to me that the government was in fact listening to all Canadians during the copyright consultations of the summer of 2009. The bill represents what in my view is a real attempt to accommodate multiple perspectives on copyright. That's not something that can be said about every copyright bill that we've seen in recent history.

I will organize my brief comments around three principles and argue that where this bill succeeds, it vindicates these principles, and where it fails, it violates them.

First, copyright ought to reflect the reality of Canadians' everyday ordinary dealings with content. Bill C-32's time-shifting, backup, and private copying exceptions respect this principle. The bill has finally legalized the VCR, something that took a very long time to do. It also has legalized the iPod and other consumer technologies.

This principle is also consistent with Bill C-32's recognition that parody, satire, and educational fair dealings—“fair” dealings, dealings that are “fair”—ought not to infringe copyright, and that user-generated content is a celebration of creativity, not a threat to it.

Where the bill of course violates this principle is in its anti-circumvention provisions, the most controversial and, in our submission, unbalanced portions of the bill. As the provisions are drafted now, many, many legal activities would become illegal merely because one has to circumvent the digital lock to do it.

This has the perverse effect of locking many creators away from the content they need to create. Consider documentary filmmakers: how do they source content behind a digital lock? News organizations: what happens to the six o'clock news in the future when more and more content goes online, goes digital, and goes behind digital locks?

Why on earth are we making the lives of these creators and these organizations more difficult? CIPPIC advocates permitting circumvention for non-infringing purposes.

The second principle is that copyright enforcement ought to be directed at actors that destroy wealth and undermine creativity, not at children, not at downstream creators and innovators, and not at public institutions like libraries, schools, archives, and museums. In short, copyright litigation should never become a business model in Canada.

Mass litigation against consumers and small businesses is an abuse of our publicly funded judicial system. These are taxpayer resources we're talking about.

Our copyright legislation ought to provide incentives to engage consumers through innovation in the marketplace, not through litigation. Accordingly, CIPPIC supports Bill C-32's reforms on statutory damages, which seek to do just that.

● (1115)

These reforms could go further. I don't understand why we have statutory damages that include in their target public institutions like libraries, museums, or archives. These are organizations that operate in the public interest. They ought to be free of the coercive influence of statutory damages.

Similarly, CIPPIC endorses Bill C-32's efforts to give rights holders the tools to discipline bad actors who seek to profit through active promotion of piracy. Such laws are technologically neutral and do not confuse digital infrastructure with the promotion of piracy.

Third, copyright ought to recognize the full range of creators and innovators that participate in Canada's cultural and economic life, and CIPPIC is supportive of Bill C-32's recognition of this reality.

Consider the ISP liability and search location liability provisions. The bill's treatment of these entities, for example, recognizes the value of content-neutral technology to Canadians and so provides incentives for continued investment in innovation.

The bill also offers particular expansions of creator rights that serve the public interest. For example, CIPPIC supports Bill C-32's creation of moral rights to performers.

Similarly, CIPPIC is supportive of much of the treatment given photographers under the legislation, but not all of it. One area in particular that we have a great concern around is the elimination of the commissioned photograph rule. This is a provision that hasn't received a great deal of attention before this committee, and I think it deserves some attention.

Right now, the law is that we all enjoy copyright in the photographs we commission. These are our wedding photos, our baby photos, our graduation photos, and our anniversary photos, these kinds of things. That accords with our reasonable expectations. We've hired the photographer. We've created the occasion for which the photographs are taken. Our expectation is that we'll own the photographs, and that includes the copyright in the photographs.

Under Bill C-32, unfortunately, this rule is reversed. Now, a consumer who wants to own copyright will have to negotiate for it, but unfortunately, most consumers just aren't sophisticated enough. They don't know that copyright is an issue. Their legitimate expectation, their reasonable expectation, is violated.

They don't know that it's an issue they now have to bargain for, so they won't bargain for it, and then mischief will arise. This is the single most privacy-invasive, anti-consumer portion of the bill and is one that CIPPIC would like to see addressed.

● (1120)

The Acting Chair (Hon. Maxime Bernier): Could you conclude, please?

Mr. David Fewer: I thank you for inviting me here today, and I would welcome your questions on any of the topics I've discussed, from educational fair dealing to anti-circumvention.

Thank you.

The Acting Chair (Hon. Maxime Bernier): *Merci, monsieur Fewer.*

I will give the floor to Mr. McOrmond for five minutes.

Mr. Russell McOrmond (As an Individual): First, I offer my condolences to Gordon Brown.

If you have my brief, you actually have a partial transcript of what I'm about to say.

My name is Russell McOrmond. I'm the policy coordinator for CLUE, the Canadian Association for Open Source. I'm the co-coordinator of an organization called "Getting Open Source Logic INto Governments". I'm the host for Digital Copyright Canada, which uses the domain name billc32.ca. I'm an independent software author and a technical consultant.

I coordinate a few petitions that have been tabled in Parliament. There's the petition for users' rights, which has had nearly 3,000 signatures tabled, and a petition for information technology property rights, which has had nearly 400 signatures tabled.

But I am here today as an individual. I do not envy you the job that is in front of you. Copyright is as complex as tax law and, as is the case in tax law, there can be both too little and too much. I have often said that copyright is to creativity as water is to humans: too little and you get dehydrated and die, too much and you drown and die.

A bill dedicated to the ratification of the 1996 WIPO treaties would have been complicated enough. The bill before you is an omnibus bill that includes many unrelated topics and it is unlikely you will have the time to adequately study the impacts of all of these topics.

Even though the bill has been passed at second reading, topics that are outside the bill have continued to be included in presentations and questions. I have created a set of frequently asked questions and answers at billc32.ca/FAQ. While I offer commentary and alternatives to many of the policy positions within the bill as well as topics outside the bill, today I must focus on my primary concern, which is information technology property rights. I have some props that I use. I've been doing this presentation for a few years.

I'm holding up four things. In one hand, I'm holding a DVD, which represents two things: some copyrighted content and the tangible medium it is stored on. These two things can have two different owners, and the rights of each should be respected. In my other hand, I hold some digital technology. It's my Google Nexus One phone, which represents hardware and software. Again, these can have two different owners: the copyright holder of the software and the owner of the information technology.

While you have been told that technical measures are entirely a matter of copyrighted content, real-world technology works quite differently. It is not possible to understand the impact of Bill C-32 in real-world scenarios without a better understanding of that technology.

On the content side, it is possible to encrypt content such that it can be accessed only if you have the right keys. I have here one example of an access control.

I discuss in my Bill C-32 FAQ how access is a novel concept in copyright, and how protecting access and access controls effectively creates an opt-out of the rest of the Copyright Act for those who make use of access controls. I also discuss how legal protection for access controls in copyright law can be abused to circumvent the traditional contours of contract, e-commerce, privacy, trade, and consumer protection and property law.

Content cannot itself make decisions such as whether it can be copied or how many times, or any of the other things that copyright holders might like to encode in their licence agreements. Content alone cannot make decisions any more than a paperback book is capable of reading itself out loud. Any decisions that are made are encoded in software that runs on computing hardware. What are often called "use controls" in the context of copyright are nearly always software running on computing hardware.

It is critical, therefore, to think not only about the interests of the copyright holders of content, but also about the interests of software authors and the owners of information technology.

I am a software author. Before copyright can offer me anything, I need to ensure that the owners of technology have the right to make their own software choices. If they are not able to make their own software choices, how can they possibly choose my software? This means that IT property rights, including the rights of owners to make their own software choices, are far more important to software authors than copyright.

● (1125)

Let's talk about some real-world technology examples. This DVD here has an access control applied to it—notice that I said "access control"—called "the DVD content scrambling system". The keys for this type of digital lock are managed by the DVD Copy Control Association. It is important not to let the title of the organization confuse you into thinking that this is a copy-control or a use-control technical measure, as it is not. The DVD Copy Control Association is an association made up of major studios, major hardware manufacturers, and major software vendors. This organization negotiates what features will be allowed in hardware and software that will be given keys capable of unlocking the access control applied to the content. It is the contractual relationship between these major vendors—not copyright—that this access control is protecting.

If you are a competitor of the members of the DVD CCA, or for any reason cannot sign on to their contractual obligations, you will not receive the keys to encode your own content or decode content. It should be reviewed by the Competition Bureau to determine whether such contractual obligations should be allowed. Tying the ability to access content encoded with DVD CCA keys requiring a DVD CCA-approved access device seems like a textbook example of "tied selling" under section 77 of the Competition Act.

Any time you hear the word "lock", you must always ask who manages the keys. It is not the owner that is in control but the entity who manages the keys. In most real-world examples of technical measures, copyright holders do not control the keys to locked content. They are sometimes but not always given the choice about whether it is locked or not, but not much control beyond that. In the case of locks on hardware and software, the keys are specifically denied to the owners of the hardware. The purpose of the lock is to lock the owner out of what they own.

For no other type of property would this be considered. We would never legally protect non-owner locks to all guns in a country where many are uncomfortable with the mere registration of long guns. We would never legally protect non-owner locks on our homes, alleging it was necessary to protect the insurance industry from fraud. We would never legally protect non-owner locks on our cars, allegedly to ensure that automobiles could never be used as a getaway vehicle.

The Acting Chair (Hon. Maxime Bernier): Thank you. Could you conclude?

Mr. Russell McOrmond: Actually, I'll leave it there.

[*Translation*]

The Acting Chair (Hon. Maxime Bernier): Thank you very much, Mr. McOrmond.

[*English*]

Now I will give the floor to Mr. Garneau.

[*Translation*]

You have seven minutes.

Mr. Marc Garneau: Thank you, Mr. Chair.

[*English*]

I'd like to begin by thanking both of the individuals who have come here today.

I'd like to start with Mr. Fewer.

First of all, I was certainly interested in hearing your views on the circumvention for non-infringing purposes of TPMs. That's a point of view that I share.

I would like to talk about a few other things that you didn't have a chance to talk about. You alluded to statutory damages, but I'd like to know what your opinion is of the statutory damages proposed in Bill C-32 as it is currently written.

Mr. David Fewer: I think it's a very progressive move. I assume that you're talking about the reduction of statutory damages to consumers in non-commercial instances to a cap of $5,000. I think it's good.

It does two things. First, it maintains the disincentive or the coercive threat of infringement. Five thousand dollars is a lot of money for the average Canadian family. To be hit with the threat of an infringement suit seeking $5,000 in statutory damages is a sufficient deterrent for the average Canadian, and even for the above-average Canadian. That's a lot of money.

What it also does is remove the incentive for some stakeholders to use statutory damages as a tool to go out and get coercive settlements. You go and approach somebody, saying you have 30 images on your website, and statutory damages are $20,000 per instance. Eliminating that kind of coercive effect I think is good. It removes the incentive of trollish behaviour while maintaining the deterrent effect of statutory damages on individuals.

Something that I think has been lost in the debate on statutory damages and the appropriateness of the value is the option available to copyright owners to prove damages. That's what we do in just about every other area of law. If someone has committed a wrong, you prove damages. We give a special remedy to copyright holders that they have the option of not having to prove damages and electing statutory damages. If statutory damages don't reflect real damages, they can opt to prove damages and get above $5,000.

● (1130)

Mr. Marc Garneau: Thank you.

I have quite a few questions, so I'll proceed.

I believe I heard you say at one point that you felt that litigation should not be directed at children. I'm assuming you mean, by "children", anybody under 18.

Secondly, do you not have a concern...? Children do certainly indulge in downloading copyrighted material. I don't know what the statistics are, but it's fairly common. Do we want to send out a message that, "Okay, everybody in Canada, until you turn 18, you can do whatever you want, but the moment you turn 18, you'll be subject to penalties"? Is that what you're essentially saying?

Mr. David Fewer: For the age limit, 18 strikes me as reasonable, though for the purposes of this brief I haven't done an inquiry into when adult capacity should kick in.

In terms of the messaging, something really perverted has happened in the copyright space over the last decade. When disruptive technology hits a business model in the copyright space, usually one of two things happen. One, the communities, the businesses, evolve. They adapt to the new technologies and find a way to monetize it, find a way to put a business model over top of it, and gain revenue. But if that can't happen or doesn't happen, what usually happens is a legislative response, where we turn copyright from an exclusive right into a remunerative right.

That's why we have the radio system we have today. Radio started as pirate radio. When radio stations first emerged, they just played whatever they wanted to. Copyright owners went after them and said, "You're infringing our copyright."

Interestingly, the legislative response was to say that we don't want copyright owners controlling radio, so we're going to turn the exclusive right into a remunerative right. Radio stations can play what they want to play, but they have to pay a fee that is fairly arrived at through a neutral process—something set by the Copyright Board, for example. That's the system that we have here today.

We haven't done that in peer-to-peer. We haven't seen, first, innovative responses in the marketplace to the emergence of file-sharing, the emergence of digital networks generally. We're starting to, but we haven't seen it yet, particularly not in Canada. Second, we've seen incredible resistance right from the get-go to any kind of collective licensing mechanism.

I mean, we like collective licensing in Canada. I like collective licensing. As a director of CIPPIC, I'm a supporter of collective licensing. But we haven't seen that approach. We haven't seen that approach mostly because certain stakeholders have been adamantly opposed to a collective approach.

Other stakeholders, such as the Songwriters Association of Canada, have been more open-minded about this in looking for mechanisms—through legislation, through the Copyright Board, or through private ordering—to put such a scheme in place. That, I think, is the best response to this phenomenon.

Mr. Marc Garneau: Thank you.

I have one other question, and it's to both of you.

You didn't mention anything specifically about ISP liability, or I didn't seize anything. What is your position on the notice and notice approach taken in this bill? In your opinion, is it sufficient or insufficient?

● (1135)

Mr. David Fewer: It's the right approach. It allows our networks to concentrate on being the best networks they can be, and that's what they need to concentrate on.

Mr. Russell McOrmond: I agree that it's the right approach. These intermediaries should not be in the position of judging whether or not something is a copyright violation. It's not a simple yes or no. Most Canadians, most ISPs, are not lawyers, and nor do all lawyers agree on what is and is not an infringement.

What is an infringement should be taken to a court. ISPs should not be in the position of trying to judge that.

Mr. Marc Garneau: I've been asking for some time whether we have statistics that describe whether or not notice and notice is working. I'm sure that information can be collected, because some ISPs do provide notice that people are infringing, and yet I have not seen any statistics that show whether or not it's an effective mechanism.

Some people would say, yes, as soon as you get that first notice, it's going to create a chill, and you're not going to do it again. Other people take a different point of view and say that informed infringers say, “Oh, I know this doesn't mean a darn thing”, and continue to do it.

Are you aware of any statistics from ISPs that say whether or not this has proven to be a good mechanism—in other words, people don't repeat once they've gotten that first notice?

The Acting Chair (Hon. Maxime Bernier): Please make it short.

Mr. David Fewer: I don't know of any statistics, but I can give you anecdotal evidence. People come to my clinic, having received these notices, and the advice I give in the discussion we have usually results in the clients saying, “This is never happening again in our house.”

The Acting Chair (Hon. Maxime Bernier): Thank you.

[*Translation*]

Thank you.

I will now turn the floor over to Mrs. Lavallée.

Mrs. Carole Lavallée: Thank you, Mr. Chair.

Mr. Fewer, if I understood correctly, you said in your presentation that consumers should become copyright owners. And Mr. McOrmond, you said in one of the documents I read that you wanted to do your share in taking all of us to the post-industrial era by rejecting the notion of intellectual property. Am I to understand that you both disagree with the idea that a work of creation belongs to its author?

[*English*]

Mr. Russell McOrmond: I actually reject the term “intellectual property”, because it causes a lot of confusion, and it's a confusion I've heard among members of Parliament. There is confusion about what is a trademark and what is copyright. The term “intellectual property” causes a fair bit of confusion. It also causes a fair bit of confusion as to the nature of the harm of infringement. I would compare infringement to such an intangible property as trespass, not theft.

So I reject the term “intellectual property”, but I strongly support copyright. I support patents. I support the consumer protection aspects of trademark law and anti-counterfeiting. It's the term “intellectual property” I reject.

[*Translation*]

Mrs. Carole Lavallée: Mr. Fewer.

[*English*]

Mr. David Fewer: I don't think you would have seen me write anywhere that I reject the term “intellectual property”. At the clinic, we're staunch supporters of an effective system of copyright and other intellectual property that works for all Canadians.

Could you repeat the first part of the question? You asked me about consumers.

[*Translation*]

Mrs. Carole Lavallée: When you presented your brief, did you say you wanted consumers to be copyright owners?

[*English*]

Mr. David Fewer: Consumers can certainly turn into creators, and today, more and more, there are new forms of creativity available to consumers. I don't think I said that consumers would become owners of intellectual property. It may have been when I was trying to explain that I understand that the community copyright has to serve is more complex than a simple creator-user polarity.

There are creators. There are users. There are copyright owners. There are distributors. There are other intermediaries. It's a very complex mechanism, and it does go full circle. Some users become creators. Some creators, such as documentary filmmakers, news organizations, and so on, are by nature users.

● (1140)

[*Translation*]

Mrs. Carole Lavallée: First, I think you are referring to user-generated content, which means that, under Bill C-32, consumers would be able to use artistic works without permission from and without compensation to the author. I must tell you now that, in France, SACEM, which defends the rights of songwriters and music publishers, has negotiated royalties with YouTube. It's sort of the same system you were talking about earlier.

When radio started, authors complained that their works were being used without compensation, and then radio stations ended up paying royalties. Similarly, YouTube is agreeing to pay royalties to collectives that ask them to pay, and that's great. Of course, consumers will have access, but eventually someone will have to pay. When consumers listen to the radio, they don't pay, but the radio station does. So the system is the same. We cannot give works to consumers by telling them: "You can use them without anyone paying royalties". The system must absolutely rely on principles, such as making things available to the public—that's how it is with radio and it may also be like that with YouTube—so that someone pays the creators.

I personally think that this might be more obvious in French than in English. In English, you talk about copyright, which means the "right to copy" whereas, in French, we talk about *droit des auteurs*, meaning "the right of authors". People are very jealous of Quebec's copyright system. We have a star system that works really well. We love our artists and we encourage them. It is not just a star system, but it is also an ecosystem that works very well for consumers, creators and distributors.

You mentioned the education system. In his brief, I think Mr. McOrmond compared royalties and copyright in education to government subsidies.

In Quebec, the royalties paid to authors by the education system work very well. No one has complained so far. Not only does the Minister of Education not complain, but she is criticizing Bill C-32 for trying to exempt the education sector from paying copyright. Everyone in Quebec thinks that's the wrong signal to send to young people. Young people have to be aware when they use creative works. There is no access problem in Quebec and, I would suspect, in the rest of Canada, but there is a problem with respecting artists and their work. It is about compensating them. If we want to wake up and still have artists and a vibrant, interesting and rich culture, the least we can do is pay the people who are responsible for that creativity, meaning the artists.

[*English*]

The Acting Chair (Hon. Maxime Bernier): Within 10 seconds, do you have any comments?

Mr. David Fewer: I have a quick comment on the user-generated content exception.

I don't have an issue with what you said. They all seem to be good responses to the phenomenon. The major point is that you don't want to have a situation where children at home are liable for copyright infringement because they're doing a version of a favourite song and uploading it to YouTube.

If we're going to look for a compensation mechanism, let us then look for one. But the worst system would be one that says it's an infringement and that our children are copyright infringers and liable for statutory damages for that activity.

This is a good thing. We should find a way to make it happen. Bill C-32 is one way to make it happen.

The Acting Chair (Hon. Maxime Bernier): Thank you.

Mr. McOrmond, briefly.

Mr. Russell McOrmond: You may have misread me when I was saying a government funding program. I think institution-specific exemptions to copyright are a government funding program masquerading as copyright. I happen to believe that a copyright should work inside the classroom the same way it works outside the classroom and that there shouldn't be exceptions that are specific to institutions.

[*Translation*]

The Acting Chair (Hon. Maxime Bernier): Thank you very much.

Mr. Angus, the floor is yours.

● (1145)

[*English*]

Mr. Charlie Angus: Mr. Fewer, you talked about your work with documentary filmmakers. I've spoken with many documentary filmmakers who are concerned already about the inability to access material that maybe in the United States would be under public use or would be under fair use, the ability to actually sign off on so many legal requirements already existing, but they're now very concerned about the digital lock provisions because of the inability to extract works.

Do you think this will have an impact on creative ability that we see? Our documentary filmmaking community is second to none in the world, but they seem to have numerous issues with this bill.

Mr. David Fewer: Documentary film as a form was invented in this country, so we should pay special attention to the filmmakers' interests.

You are absolutely right: the anti-circumvention provisions in particular are a problem for documentary filmmakers. They're going to become a bigger problem as more content goes online and goes behind digital locks or other content-delivering mechanisms, which will include technological controls. So the anti-circumvention side is a problem.

The fair use or fair dealing side is an interesting challenge as well. Documentary filmmakers right now have to squeeze their dealings into one of the five currently enumerated exceptions, and it's not always easy to do. A good example would be a historical clip. It's being put in there for context and background. Is that criticism, is it review, or is it a private study? It's difficult.

I believe that documentary filmmakers were asking for fair dealing...for the categories to become illustrative as opposed to exclusive categories that qualify for the fairness analysis. Their plea went unheard. We got parody and satire, which are good as far as they go, and the educational fair dealing I think had some value as well, but documentary filmmakers' needs in this phase were ignored.

Mr. Charlie Angus: The premise being put forward by the government is that if you have a problem with the digital locks, go to the market. I mean...talking with young people, good luck calling Sony when you've bought a product and you can't use it. I don't know if their 1-800 number has ever...or even if they have one. So you don't really have an option.

If they don't like it, I find what young people do is just download it. They will go to a legal market, or if they're denied, they'll go to the other market. We're always using that word “balance”, but what concerns me about this bill is that they're guaranteeing consumer rights and they're guaranteeing individual rights in law, but citizens are not necessarily able to access those rights.

I know there has been some discussion about the constitutionality of these provisions. I think Professor de Beer, one of your colleagues, has written about it. Do you believe that if we legislate rights and then citizens are not able to access them that would face a constitutional court challenge?

Mr. David Fewer: I'll make three comments here.

One, on the response to go to the markets and negotiate access, you forget that copyright is about exclusivity, right? Copyright gives control and the power to say no.

Copyright has a dangerous potential for being a tool of censorship, especially when you're talking about documentary filmmakers or other news organizations, or other critical organizations that want to embrace their section 2(b) charter rights—freedom of expression—and participate in a robust way in debate about an entity, about anything, right? You've got some problems.

The second point I'll raise on the constitutionality is that I think there are two constitutional problems. One is Professor de Beer's argument that any circumvention rules are about devices. It's about property. It's about contracts at the end of the day. It's not about copyright. It's not about intellectual property. So how do you get under the appropriate federal head of power? It sounds a lot more like property and civil rights, which is a provincial sphere of authority.

Then the second argument is a charter argument, right? We don't recognize this often enough. Section 2(b) guarantees freedom of expression. Copyright attaches only to expression. The overlap is 100%, so if you don't get the balance right in federal legislation, in the Copyright Act, you have a section 2(b) problem.

If you look at what anti-circumvention rights are doing, what anti-circumvention laws are doing, and the very narrow scope for avoiding liability for circumventing and the very real probability that you won't get permission to circumvent from a rights holder in all cases, particularly in critical cases, you have a section 2(b) problem as well.

● (1150)

Mr. Charlie Angus: Mr. McOrmond, I want to ask you about the key holders and the TPMs as a business model, because we've heard many complaints out of the United States that the DMCA was not always used for copyright enforcement, that it was actually used to keep out competitors, to deny them access to new and emerging markets.

The notorious story is the automatic garage door holder and no-name products. They were sued under the U.S. DMCA. Are you concerned we're going to be in a situation where software development and other new technologies are going to be unfairly circumscribed because the digital lock provisions will be used against competition?

Mr. Russell McOrmond: I actually have a hard time picturing a use of these technical measures that is not anti-competitive, and I also have a hard time envisioning situations where it'll actually help a copyright holder.

In most cases with that digital lock that's put on the content, the key is held by somebody other than the copyright holder. This is a non-owner lock. So for the key that's on these devices that is authorized to access the content, again, the lock is specifically denied from the owner. We should always be asking who owns what is locked: who has the keys? If it's somebody other than the owner who has the keys, you should be wondering exactly what they are trying to pull on us.

There's something dishonest going on there, which is why I suggest taking these things into the right areas of law. For instance, if you have an access control that's protecting your electronic commerce website, well, e-commerce, first of all, is a provincial responsibility, which gets us right back into the constitutional question. But that's where that legal protection should be, in the right area of law. Copyright is not the right area of law to be protecting an e-commerce site.

[*Translation*]

The Acting Chair (Hon. Maxime Bernier): Thank you. Your time is up.

I will now turn the floor over to Mr. Fast.

[*English*]

Mr. Ed Fast (Abbotsford, CPC): Thank you very much, Chair.

Thank you to our witnesses.

I'm going to direct my comments to Mr. Fewer. Thank you for coming. You've obviously given this a lot of thought in teaching at... I believe it's the University of Ottawa law school. Is that correct?

Mr. David Fewer: That's right.

Mr. Ed Fast: I'd like to first of all address something that was raised by Ms. Lavallée. She didn't really give you an opportunity to comment extensively on that.

As you know, this bill moves us to legitimize more of what users do every day, whether it's time-shifting, format-shifting, mash-ups, and of course fair dealing, the education exemption. Ms. Lavallée—and I'm going to paraphrase her because I don't have the direct translation here—said that everyone agrees that it's a poor signal to send out if we expand fair dealing to include education.

There are some who have articulated that view here at committee. It has been a minority view, certainly not everyone. In fact, my impression is there has been overwhelming support for expanding fair dealing to reflect the realities of today's world—not only to reflect those realities but to ensure that Canadians have the ability to expand knowledge, to build on knowledge.

Perhaps you could comment. You spoke generally favourably of the educational exemption contained in Bill C-32. I'm assuming you do support it. Perhaps you could mention some of the benefits that we'll derive from fair dealing that includes an education exemption.

Mr. David Fewer: Absolutely. The educational fair dealing exception, in my view, is the single most widely misunderstood provision of the act. In my view, it does a few very important things, but they're not major things. The one thing that it doesn't do is undermine business models or undermine revenues enjoyed by authors as a result of collective licensing in the educational community.

I'm sure you've all seen the articles in the newspapers saying that educational fair dealing will permit wholesale copying of textbooks or will permit replacing textbooks with course packs, with bits of copying here and there. It won't do any of those things. And it won't do those things because they're not fair. It's not going to pass.... They're educational, absolutely. They're educational, but they're not fair. Those strategies replace a royalty-bearing thing, the textbook, which authors have come to expect getting paid for, and rightly so. Certainly we would never support any provision that sought to undermine that institution.

So then the question is, what does educational fair dealing do? In my view, it does two things that are extraordinarily important.

One, it gives teachers the confidence to bring technology into the classroom. Public educational institutions are incredibly conservative organizations and very risk averse. There is a reluctance to bring in new technologies that may incur liability. Educational fair dealing covers that. Then you do have the confidence that you can bring in video, you can bring in the Internet, you can bring in new devices, and you can bring in social networking. You can bring a lot of great things into the classroom, innovative things, things that we haven't even thought of yet, and enhance our children's educational experience. That's what a good copyright law should endorse and should support.

The second thing it does, which I think is actually even more important, is that it opens up a closed curriculum. What I mean by this is that it allows students to bring their own content into the classroom. It allows students to get up in front of the class and perhaps distribute a poem or an article they've found. It allows them to do innovative things, things they have never done before. Instead of doing an essay, they're going to do a YouTube presentation in front of the class. It allows them to be innovative and it allows them to bring content that's not on the set curriculum into the classroom.

That is so important, because that allows us to get new Canadian authors before students, rather than having the same set of novels that have been in the school for 30 years. Now we can get something in there that's brand new, that no one has seen before, that's fresh off the press, something that a student has discovered and wants to share. That's what education is about and that's why educational fair dealing is so important.

● (1155)

Mr. Ed Fast: Thank you.

I'm glad you mentioned that this bill does not undermine the business model. That is critical here. We have had some witnesses, most notably the publishers, who have said this totally undermines their business model.

But if you go to the Alberta v. Access Copyright case, which I know you're familiar with, it actually says the contrary and makes it very clear that we aren't replacing royalty-producing activities with something that's going to essentially cannibalize the profits that publishers would make.

Perhaps you could comment.

Mr. David Fewer: Yes. That Federal Court of Appeal case is incredible, in that the court actually looked at Bill C-32and said that the educational fair dealing amendment won't change the fairness analysis. So it won't have an impact on the business model. It won't have an impact on the need to pay royalties for those kinds of dealings. That supports my view.

The other thing that supports my view and that doesn't get a lot of attention is what happened across the border. In the United States, the fair use exception actually has within its four corners a provision that says multiple copies for classroom use can be fair use. That's the equivalent of the fair dealing provision. We don't have the multiple copies business in our educational fair dealing amendment.

But you know what? Even though the States does have the multiple copies business, universities in the States still pay royalties for casebooks. Money still comes across the border into Canada for course packs that are being copied in the United States and that include Canadian authors. If they're still paying royalties in the States with that incredibly lenient fair use provision, it's not going to happen here in Canada with a more limited educational fair dealing provision.

Regardless of that, if you go back to that first point, it's not fair. If it's not fair, it's not covered by educational fair dealing. I think that's the ultimate guarantee of the safety of educational fair dealing to authors.

[*Translation*]

The Acting Chair (Hon. Maxime Bernier): Thank you.

I am now going to give the floor to Mr. McTeague.

Hon. Dan McTeague (Pickering—Scarborough East, Lib.): Thank you, Mr. Chair.

I would also like to express my condolences to Gordon Brown for the loss of his mother.

[*English*]

Mr. Fewer, do you think the law should be clearer that sites like isoHunt and The Pirate Bay are in fact illegal in Canada?

Mr. David Fewer: I'm not familiar enough with the specificities of those sites, the facts of what those sites do, but I would definitely say that businesses that build a business model on encouraging wealth-destroying activities and piracy should be illegal in Canada.

● (1200)

Hon. Dan McTeague: Thank you.

With respect to statutory damages, building on your response to my good colleague Mr. Garneau and others, there are some academics who have argued that the proposed $5,000 cap—and I think you referred to it as a progressive move—represents a good compromise. Others here call it a licence to steal.

I wonder if the $5,000 penalty might actually encourage pirates to steal massive quantities of content. The most they'd end up with, as far as liability is concerned, is a one-time lump-sum payment. I wonder if you'd agree that this would be a licence or an opportunity that permits them to freely engage in continuing illegal activities. From your perspective, do you not see a problem with that?

Am I over time already?

The Acting Chair (Hon. Maxime Bernier): Yes, because it's going to be short.

Hon. Dan McTeague: Was that five minutes?

The Acting Chair (Hon. Maxime Bernier): No, it's not five minutes. We have to finish at 12 o'clock. You still have a minute to ask your question. I want all members to have a second round.

Hon. Dan McTeague: Thank you.

I'll leave it at that, Mr. Fewer.

Mr. David Fewer: I have two very quick responses to that, and actually they're varieties of the same one.

I don't think consumers act that way. That's not how we think or operate in the marketplace. We don't draw our incentives based upon the remedies available to copyright holders and the Copyright Act. It's just not on the consumer list of things to do or on their Christmas shopping list: “Consult liability for building a massive library”. It doesn't happen.

The second reason why it's not very consistent with how we act as consumers is that we like new stuff. The provision is $5,000 for what you've done today, but if you go out tomorrow and start amassing a new library, or download, or steal the latest, greatest film, looking forward, you're not immune. The reality is that we all enjoy current content.

Hon. Dan McTeague: I'm referring to large-scale infringers, Mr. Fewer, and those who might have a repeat instance of doing it, given that the threshold of liability would only be $5,000. Are you concerned about that?

Mr. David Fewer: They'd be users, right?

Hon. Dan McTeague: Of course.

Mr. David Fewer: When I say “users” I mean “consumers”.

Large scale infringers, if they're on a commercial scale, the commercial infringers, are not captured by the minimum.

Hon. Dan McTeague: I think I'm over. I'm being gonged here.

The Acting Chair (Hon. Maxime Bernier): Thank you very much.

[*Translation*]

I will now let Mr. Cardin have the floor.

You have two minutes.

Mr. Serge Cardin (Sherbrooke, BQ): Two minutes? You are generous, Mr. Chair.

Good afternoon, gentlemen.

In your brief, you have said the following:

> I have often said that copyright is to creativity like water is to humans: too little and you dehydrate and die, too much and you drown and die.

The Canadian Conference of the Arts has calculated the royalties creators would be losing under Bill C-32. The total comes out to $126 million, which is rather conservative. The creators will literally dry up. What do you think about that?

If we have enough time, could you tell us about the keys and how they could protect copyright, even though they are not owned by the authors or the copyright holders?

[*English*]

Mr. Russell McOrmond: First, I wouldn't take it as written that it's a reality. As has been said many times, fair dealings are not free dealings. In Canada we have those two steps to go through. First, does a dealing go to criteria? And then, is it fair? In the United States, they just skip straight to “is it fair?”

Because they skip straight to that, people have come to understand the fairness test more than whether it fits into some narrow criteria. I actually think it would be better for everybody concerned if we moved to a “such as” language and got the criteria out of the way so people would start to understand “is it fair?”

All this loss that's being discussed, well, none of that would be considered "fair", so I don't actually believe the loss exists. I can't deal with a reality that I don't necessarily believe is a reality.

[*Translation*]

The Acting Chair (Hon. Maxime Bernier): Thank you very much.

I will now turn the floor over to Mr. Braid.

[*English*]

Mr. Peter Braid (Kitchener—Waterloo, CPC): *Merci*, Mr. Chair.

Thank you to both of our witnesses for being here today.

We'll see how much time I have.

I'll go first directly to you, Mr. Fewer.

Perhaps through the course of our proceedings there has been some confusion, some blurring of the line, between commercial infringement and non-commercial infringement and how the bill deals with those two categories. Could you just speak to the difference between commercial and non-commercial infringement, provide some examples of each, and tell us how the bill supports these two different areas?

● (1205)

Mr. David Fewer: Yes. Ultimately, it's a distinction that would be interpreted by the courts, but I would argue that there are certain classes that clearly fall in each.

Non-commercial infringement would be the private copying that Canadians do every day with their content: making backups that right now aren't covered by exceptions under the act, and moving content off a CD onto an iPod, for example, again an activity not covered by an act. Those are all private, they're plainly non-commercial, and they also plainly don't undermine business models. In fact, because they make content more useful, they actually provide incentives to purchase the content in the first place.

The commercial-scale infringement is different: you're entering into a field of commerce and either trading on it or using content in such a way as to make money in some other peripheral way. Where the distinction gets very difficult and where we have to engage in a line-drawing exercise is that somebody might have a website that has something like Google ads, which pay a very small amount and help to cover the cost of the site, of the blog, or whatever it is. Those are the cases where I think you have to be careful about saying when something is commercial and when something is simply trying to make it more remunerative to engage in a hobby.

The Acting Chair (Hon. Maxime Bernier): Thank you very much.

[*Translation*]

You have shared some interesting and original viewpoints with us.

Thank you very much, Mr. Fewer and Mr. McOrmond.

[*English*]

I will suspend our work for two minutes and we'll be back for committee business.

Thank you.

● (1205)

(Pause)

● (1210)

[*Translation*]

The Acting Chair (Hon. Maxime Bernier): We are now going to continue the work of the legislative committee on Bill C-32. We are going to look at Carole Lavallée's motion.

Mrs. Lavallée, I will give you the floor so that you can speak to the motion.

Mrs. Carole Lavallée: First and foremost, I know that it is unusual to have a motion asking that a witness come to testify. I don't intend to make this a habit. Our system is based on suggestions, so it is much more flexible and it should stay that way.

I wanted to introduce this motion because I thought that Gary Fung had been forgotten along the way. Perhaps it would be useful for us to pass a motion to show him that we really want to hear what his position is on Bill C-32. He is leading one of the main activities targeted by Bill C-32 and I would personally like to know if he is in favour of or against the bill.

In the text, I say that Mr. Fung's company is in Vancouver. He owns one of the most popular Internet sites for peer-to-peer file-sharing in Canada. In an article called "The Pirate Bay's Heir Apparent"and published on December 1, 2009 in *Forbes*, we can read the following:

> I won't deny that practically everything we index is copyrighted … however, we're merely a search provider for what's available. Everything I say about peer-to-peer file-sharing is merely my opinion. It's not something we enable. We don't enable file-sharing any more than Google enables the Internet.

I would like him to come and explain this passage from *Forbes* to us.

The Acting Chair (Hon. Maxime Bernier): Thank you, Mrs. Lavallée.

[*English*]

Monsieur Rodriguez, you have the floor.

[*Translation*]

Mr. Pablo Rodriguez: Thank you, Mr. Chair.

In my view, this way of doing things poses a fundamental problem. I said so to Mrs. Lavallée yesterday. We are about to set a precedent. We are running the risk of burying ourselves in motions. Each person could come up with 50 motions for 50 separate witnesses. I wouldn't like us to set this type of precedent because the committee might end up wasting a lot of hours.

The Liberal Party is not against the idea of receiving Mr. Fung, but we would rather have his name added to the list of witnesses and have him be invited to deliver his testimony. If this motion is passed, everyone will introduce theirs and I will personally introduce tons of motions. Let's keep doing what we have been doing until now.

● (1215)

The Acting Chair (Hon. Maxime Bernier): Thank you, Mr. Rodriguez.

Mr. Del Mastro.

[*English*]

Mr. Dean Del Mastro: First of all, I want to support what Mr. Rodriguez said. I think we do also run the risk of potentially insulting some of the other witnesses who perhaps didn't have a motion to come forward to request them to appear. I think that's a more prudent approach.

I would be surprised, frankly, if this witness showed up, because I think he knows he is not going to be welcomed here with loving kindness.

Voices: Oh, oh!

Mr. Dean Del Mastro: I think we'd all love to take a rip at him, but I would also point out that he's currently before the courts, so I'd be very concerned about potentially harming industry, artists, and others who are currently seeking remedies before the courts from this specific individual.

I think it's a bad idea, but ultimately we are 6 to 5, so it's up to you guys.

[*Translation*]

The Acting Chair (Hon. Maxime Bernier): Thank you.

Mr. Angus.

[*English*]

Mr. Charlie Angus: Well, I think it would be a fascinating discussion, and I would love to have him before our committee.

I am concerned, as Mr. Rodriguez said, about the precedent, because if we agree to this, then next week I might find someone from the artistic community who I think is absolutely special and bring them in, and then they would get turned down. We end up leaving the other witnesses in a position of being embarrassed or of being treated as seemingly second-class if some people are pushed by special motion to the head of the line and other people are told to wait or not heard at all, so I think we should stay the course.

It would be a fascinating discussion, and maybe at our heritage committee at one point we will invite him and follow up on this issue, but we have to stay the course on Bill C-32.

[*Translation*]

The Acting Chair (Hon. Maxime Bernier): Thank you.

Mr. McTeague.

[*English*]

Hon. Dan McTeague: You see the development of what appears to be a consensus.

[*Translation*]

I understand Mrs. Lavallée's position very well. I think it is a commendable initiative, but I also agree with the principle behind keeping the procedure the same. I was wondering whether Mrs. Lavallée would be willing to withdraw her motion if the chair now makes a statement confirming that Mr. Fung will be invited.

The Acting Chair (Hon. Maxime Bernier): Thank you.

Based on the comments made by the members of the committee, even if we don't have a vote, I see that everyone agrees with inviting Mr. Fung. Anyway, I will still turn the floor over to Mrs. Lavallée.

Mrs. Carole Lavallée: I really like Mr. McTeague's suggestion.

Mr. Chair, if you say that you are going to invite him, I could not agree more. That's not the way I suggested to go about it, but the outcome is the same.

The Acting Chair (Hon. Maxime Bernier): There is a consensus among committee members to invite Mr. Fung. He will receive an official letter on the chair's behalf inviting him to appear before us.

Mrs. Carole Lavallée: Mr. Chair, could you share Mr. Fung's response to your letter with us?

The Acting Chair (Hon. Maxime Bernier): Yes, we will keep you posted on Mr. Fung's reaction to our official invitation.

I would now like to check if we all agree to continue the meeting in camera so that we can see to the committee business.

[*Proceedings continue in camera*]

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