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Chair

Mr. Gordon Brown

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● (1100)

[*English*]

The Chair (Mr. Gordon Brown (Leeds—Grenville, CPC)): Good morning, everyone. We'll call this 19th meeting of the special Legislative Committee on Bill C-32 to order.

I'd like to thank members of the committee who sent notes of condolence on the passing of my mother. I'm sorry I wasn't able to be here for the last couple of meetings, but we're back in action now.

Today, in the first hour, we have with us from TELUS Communications, Craig McTaggart; from Rogers Communications, Pam Dinsmore; and from Bell Canada, Suzanne Morin.

We will start with Mr. McTaggart for five minutes. You have the floor.

Mr. Craig McTaggart (Director, Broadband policy, Regulatory and Government Affairs, TELUS Communications): Thank you, Mr. Chairman.

Good morning, committee members. My name is Craig McTaggart and I am director of broadband policy at TELUS Communications Company.

Thank you for the opportunity to present TELUS' views on BillC-32. TELUS considers Bill C-32 to be a strong and balanced attempt to update Canada's copyright legislation for the digital age.

In my brief prepared remarks, I want to focus on the Supreme Court of Canada's 2004 decision in the case of SOCAN v. CAIP, or the Tariff 22 case, because it established the legal principles for intermediary liability that Bill C-32 would at long last codify into statute. I do so because the decision and the principles it embodies highlight a crucial distinction between neutral, passive intermediaries, which are not legally responsible for what their users do online, and what have come to be known as the wealth destroyers, those who actively enable mass copyright infringement online.

Let me be clear right off the bat. TELUS recognizes that online piracy is a problem and encourages Parliament to arm rights holders with effective tools to directly pursue those who actively enable it. I emphasize "directly" to distinguish that approach from proposals by some rights holders to offload that responsibility onto third parties, such as ISPs. BillC-32 wisely limits the role of ISPs to assisting rights holders in the enforcement of their rights by putting Internet users on notice that a rights holder alleges that they have infringed copyright online and to retaining evidence to support subsequent legal action.

To understand why this regime is the wise choice, one has to go back at least to 2004 to see how the Supreme Court defined the scope of ISP liability for what happens on the Internet. The Tariff 22 decision established the principle that ISPs neither communicate nor authorize their customers to communicate copyright works on the Internet. The court interpreted paragraph 2.4(1)(b) of the Copyright Act, which says that persons who only provide the means of telecommunication necessary for another person to so communicate a work do not themselves communicate the work, nor are they parties to a communication. Rather, it is those who actually post copyright materials to the Internet who do the communicating.

The court described this regime in the following terms: "So long as an Internet intermediary does not itself engage in acts that relate to the content of the communication,"—that is, whose participation is content neutral—"but confines itself to providing 'a conduit' for information communicated by others, then it will fall within s. 2.4(1)(b)", the general safe harbour for communications carriers.

The Supreme Court held that in the normal course, Internet access and hosting providers are not users of copyright rights, nor are they liable for the uses made by their customers. Like telephone companies, the court said, ISPs neither know what our customers do on the Internet, nor are we in a position to control it, nor, incidentally, does anyone want us to.

The Supreme Court went on to say that the attributes of mere conduits such as ISPs "include a lack of actual knowledge of the infringing contents, and the impracticality (both technical and economic) of monitoring the vast amount of material moving through the Internet, which is prodigious". That was in 2004.

Internet traffic continues to grow at a compounded annual growth rate of about 45%. The court recognized the public policy rationale for immunizing content-neutral intermediaries from copyright liability as follows:

> Nevertheless, by enacting s. 2.4(1)(b) of the Copyright Act, Parliament made a policy distinction between those who abuse the Internet to obtain "cheap music" and those who are part of the infrastructure of the Internet itself. It is clear that Parliament did not want copyright disputes between creators and users to be visited on the heads of the Internet intermediaries, whose continued expansion and development is considered vital to national economic growth.

These are the principles that underlie the ISP-specific provisions in Bill C-32, like its predecessors, and they remain the right principles today.

What has changed since 2004, of course, is an awareness of the need to equip rights holders with additional tools to make it easier for them to enforce their rights against, in the Supreme Court's words, "those who abuse the Internet."

● (1105)

TELUS would support amendments that would give rights holders more powerful tools to go after those who actively enable infringement, and also amendments that would prevent the bad guys from taking advantage of the legal safe harbours intended to protect only the good guys.

Like Canada's other major ISPs, TELUS has voluntarily performed notice and notice service for approximately nine years. The decision to formalize the notice and notice regime recognizes the legal reality that ISPs cannot be put in the position of having to decide whether content should be taken down, in the case of hosted content, or whether to discipline their customers based only on an allegation from a rights holder in the case of file sharing. Under Canadian legal values, only a court can determine whether a law has been broken.

I'll end it there.

The Chair: Thank you.

We'll move to Pam Dinsmore from Rogers Communications.

Ms. Pam Dinsmore (Vice-President, Regulatory, Cable, Rogers Communications Inc.): Thank you, Mr. Chairman and members of the committee. My name is Pam Dinsmore and I am vice-president, regulatory, at Rogers Communications Inc. I appreciate the opportunity to present our views on Bill C-32.

Rogers is a diversified Canadian communications and media company. We are in a variety of businesses, including wireless, cable TV, high-speed Internet access, radio and television broadcasting, and program production. We also publish some of the most recognized magazines in the country, such as *Chatelaine* and *Châteleine, L'actualité,* and *Maclean's*, and we have extended these traditional brands online using digital media. As such, we support a copyright act that takes a balanced approach to the interests of rights holders and users, thereby optimizing the growth of digital services and investment in innovation.

We believe that Bill C-32 goes a long way towards striking this balance, and we support its passage in a timely manner. However, we think the bill would benefit from some changes to provide greater clarity and certainty for both users and rights holders, particularly with respect to the provisions regarding the time-shifting and hosting exceptions and the notice and notice regime.

First, we are pleased that the bill legalizes the time shifting of television programs and legitimizes the use of personal video recorders. A PVR is a set-top box that our customers rent or own. It is connected by wiring to one of their television sets. PVRs allow our customers to time shift programming from that television set and watch it at a time of their choice. It is a service that has proven to be popular with customers who watch a lot of television programs but want to watch them at the time of their choosing.

We are also pleased that the bill removes obstacles to the implementation of innovative technologies such as network personal video recorder service, or network PVRs. This service will operate in the same way as a PVR but allow for the remote storage of our customers' time-shifted content in servers located in our headends rather than storage within the set-top box. Given that a network PVR service can store programs from any television in a customer's house, it removes the need for them to rent or own a PVR for any of their television sets. It will also allow us to make seamless upgrades to our customers' network PVR service without their having to rent or purchase new equipment. It goes without saying that moving from PVR set-top boxes to a network PVR service will allow our customers to enjoy the benefits of time-shifted programming in a greener and more technically efficient way.

Network PVR is not just a concept. It was launched by Cablevision in the U.S. at the end of last year, following the ruling of a U.S. appeals court that the concept was lawful under U.S. copyright law. This means that Cablevision's customers are already able to time shift programs on any one of their home televisions sets without the need to purchase or rent a PVR. As a result of rolling out its network PVR service, Cablevision has announced that it will stop purchasing PVR set-top boxes to rent to its customers.

Rogers is eager to provide our customers with the same benefits of a network PVR service that are being experienced by Cablevision's customers. We therefore fully support the technology-neutral approach to the time-shifting and hosting exceptions in the bill. The government made this approach clear when it introduced the bill, as did Industry Minister Tony Clement when he appeared before this committee. There are, however, technical improvements that could be made to the drafting to ensure that the government's policy intent to remove barriers to the development of cloud computing and other remote storage services like network PVR are removed. In this regard, we support the BCBC's proposed amendments to the time-shifting and hosting exceptions.

Second, we support the notice and notice provisions in the bill. These provisions will make it mandatory for all ISPs to implement a notice and notice regime. This is a practice that has existed at Rogers on a voluntary basis for over a decade to combat Internet piracy. With the increase in our customer base and increased awareness of the regime on the part of rights holders, the number of notices we process has risen year over year. In fact, in 2010, we processed over 207,000 notices. In our view, notice and notice is the best and fairest way to make individuals aware that they are accused of illegal peer-to-peer file sharing while recognizing that ISPs should not unduly interfere with our customers' online activities. While we recognize that the regime is not perfect, we believe it does result in discouraging repeat offenders. The fact that some European countries are beginning to consider notice and notice as a valid response to illegal file sharing and that some ISPs in the U.S. have notice and notice agreements with rights owners serves to underscore that Canadian ISPs have been ahead of the curve for years in our approach to combatting Internet piracy.

● (1110)

The BCBC has proposed amendments to ensure that the obligations to deliver notices and retain data, and the possibility of cost recovery for doing so, come into effect at the same time. This is to ensure that ISPs have adequate time to design and implement the systems required to comply with these requirements—

The Chair: I'm sorry to interrupt, but I'm going to have to cut you off at that point. You'll get an opportunity to continue during the questioning.

Thank you.

We'll move to Suzanne Morin from Bell Canada for five minutes.

Ms. Suzanne Morin (Assistant General Counsel, Legal and Regulatory, Bell Canada): Thank you.

My name is Suzanne Morin, and I am assistant general counsel, legal and regulatory, with Bell Canada. Thank you for the invitation to appear this morning.

Bell Canada is a member of the BCBC, the Business Coalition for Balanced Copyright, so we support the submissions, both written and oral, that have been made before this committee.

I've listened to the comments and heard the comments from my colleagues this morning, and I support them. In order to save time, I won't add anything else. I think this will allow us to jump right into it.

[*Translation*]

We are now ready to answer your questions and we hope that our discussion on Bill C-32 will be productive.

[*English*]

The Chair: Thank you.

We'll go to the Liberal Party, Mr. Garneau, for seven minutes.

Mr. Marc Garneau (Westmount—Ville-Marie, Lib.): Thank you, Mr. Chair.

I'm really glad you're here this morning, because I've been asking questions about ISP liability for a long time, but you're clearly the people who I need to be asking the questions to. I listened very carefully to what you had to say. The question that has been...and you mentioned past judgments concerning the issue. Of course, we are here to craft legislation on copyright, so we have to look at this from perhaps a new perspective.

I do want to ask questions about notice and notice, because as I understood it, you all three support that approach and you're quite ready to go for mandatory notice and notice. But you already, I believe.... Madame Morin, have you been providing notice and notice on a voluntary basis without saying it?

● (1115)

Ms. Suzanne Morin: Bell Canada has also been doing notice and notice.

Mr. Marc Garneau: The question that comes up—because I hear from a lot of groups—is whether notice and notice is effective. There are consumer groups and others that say, yes, it is effective, it's working, and we don't need to ramp up to notice and takedown, or some other hybrid version of a more proactive approach, if you like. What's missing for me as an engineer is the data. I believe you have that data, because you have been providing notice on a voluntary basis to people who are stepping over the line. I'm really interested in it, because some people say that notice and notice is not discouraging those who know it has no teeth, while other people are saying, yes, as soon as you get a notice and notice in your home from your ISP provider, it sends a chill through you and you realize you'd better not do it again.

You have the data to tell us whether repeat offenders are in large numbers or whether 95% of people who have received their first notice cease and desist. I would like to hear from each of you if you have that data. If not, I'm going to ask you to present it to this committee, because we really do need that data. If you have it, it would be great to hear from each of you, perhaps starting in the way you spoke, about whether it is actually effectively working, and I'd like to see some statistics to support that.

Mr. Craig McTaggart: For TELUS' part, my answer is a very short one. We don't actually have that data. We only forward the notices. We don't retain any further data about how many messages were sent to a certain customer in a certain period, because we have no business reason to retain that data. We only have the anecdotal stories, as you referred to, that often a household receives a notice, the parent reads it, doesn't know anything about what it's about, talks to a child, and gives the strong message not to do it anymore.

Mr. Marc Garneau: I've been in that position myself.

Mr. Craig McTaggart: That's the only evidence I have.

Mr. Marc Garneau: So if John Smith gets a notice from you today, or in the past, we and you don't know whether in fact you've sent John Smith 25 notices over the course of time because John Smith is clearly ignoring the notice and notice.

Mr. Craig McTaggart: At TELUS we don't know that.

Mr. Marc Garneau: Okay.

Ms. Dinsmore.

Ms. Pam Dinsmore: I would like to tell you what happens at Rogers. We can actually track the number of notices that go to an individual household. What we can't track is how many Sony notices went to a particular household. In terms of the actual processing and sending on of a notice, we do have, at a very high level, those numbers.

Let me put it in perspective for you. On a Rogers customer base of, for argument's sake, 1.5 million Internet customers, about 5% of that customer base will receive a notice. As I said, in 2010 we processed 207,000 notices.

If I go down the pipe to the next level, of that group, of that 5% of our customer base getting a notice, which is in the area of about 70,000 customers, the next number of households to get a second notice will be somewhere in the area of, I don't know, 20,000 notices. So about a third of those who got the first notice will actually get a second notice.

As I get to the third level, I'm down a third again.

So as I go down the list, the number of notices drops in accordance with the times the notices are received.

In our view, the notice and notice routine is effective at discouraging those people who are alleged to have infringed—only alleged to have infringed—from infringing again. We think it does put the fear of God into them and it is effective in doing that.

That's based on the information that we are able to track.

Mr. Marc Garneau: To summarize—just to make sure I've understood—about 5% of your customers may receive a notice and notice. About a third of them may get a second notice, and a third of those may get a third notice.

● (1120)

Ms. Pam Dinsmore: That is correct.

Mr. Marc Garneau: Thank you.

Madam Morin.

Ms. Suzanne Morin: At Bell we're somewhere in between the two, or maybe I should say we're at the other side of TELUS.

When we started the voluntary notice and notice regime about a decade ago, we were receiving a handful of notices a month from content owners. We had a manual process. We continue to have a manual process. Last year we received over a million notices. I can tell you that we are not able to process them all. We would have to fill a whole floor with individuals in order to process them all. We haven't automated that system as we wait to see what copyright legislation will bring our way.

Anecdotally, similar to TELUS, when we began this a decade ago, it wasn't file sharing; it was content posted on a bulletin board somewhere or on a personal web page, and we saw the content come down voluntarily. That, to us, right from the beginning was a sign that, anecdotally, customers were actually responding, or their parents or spouse were responding, to notices that were sent to their household. So while I don't have the same kind of more specific information that Rogers was able to provide, anecdotally we've seen the same trend.

One thing we've noticed is that the number of notices has been increasing. It's been increasing, we think, for several different reasons. One, bandwidth is faster and more available. We are now receiving notices from Japan, from Europe. More people are sending them. The book publishers are sending them. Canada has kind of become the place to send copyright notices.

Again, we think it's effective. We think it has educational impact. But at the end of the day, it still needs something. We're waiting for legislation to be passed so that users know specifically that downloading illegally is not to be tolerated in Canada.

The Chair: Thank you very much.

Madame Lavallée, sept minutes.

[*Translation*]

Mrs. Carole Lavallée (Saint-Bruno—Saint-Hubert, BQ): Instead of talking about the individuals who use peer-to-peer file sharing, I would like to talk about the owners or administrators of those Internet sites where peer-to-peer file sharing is common practice.

First of all, would you say that Bill C-32 includes the measures and provisions required to say that Internet sites that enable peer-to-peer downloading are illegal?

Mrs. Suzanne Morin: I can go first.

At Bell—I imagine the same goes for my colleagues—we support the clauses in Bill C-32 that will make things easier. That's what we call "enablers". We are in support of those clauses.

But some people say that the measures should be a bit stricter so that it is a little easier to prove that. Perhaps our words are not explicit, but we support those changes.

Mrs. Carole Lavallée: I am going to read you paragraph 18(2.3) of Bill C-32. This is what it says:

> (2.3) It is an infringement of copyright for a person to provide, by means of the Internet or another digital network, a service that the person knows or should have known is designed primarily to enable acts of copyright infringement...

Do you think the wording "should have known is designed primarily" is sufficient?

Mrs. Suzanne Morin: We have heard some people say it is perhaps too narrow.

Mrs. Carole Lavallée: What do you think?

Mrs. Suzanne Morin: We are not necessarily here to pass judgment on the exact wording, but...

Mrs. Carole Lavallée: Yes, that's why you are here.

Mrs. Suzanne Morin: We support the changes that are going to make things clearer. I don't have the exact words that should be replaced, but if a word is changed, we will support the change. We are prepared to discuss these technicalities with other people, but I wouldn't be able to suggest the words that should be changed.

Mrs. Carole Lavallée: This is where that gets done.

Ms. Dinsmore, what do you have to say about it?

[*English*]

Ms. Pam Dinsmore: Yes, we do support the introduction of the enabler provision. We think it goes a long way to helping the rights holders go after the bad guys, as we've talked about before.

Again, we do support equally the changes that have been proposed to you by the BCBC, which make the actual section itself more specific in that it wouldn't allow or it wouldn't—

[*Translation*]

Mrs. Carole Lavallée: I am sorry to interrupt, but my time is limited. Do you have any suggestions on what should be changed?

[*English*]

Ms. Pam Dinsmore: There is a proposal in the BCBC submission to you, which we support.

[*Translation*]

Mrs. Carole Lavallée: But do you have one?

Ms. Pam Dinsmore: It's the same thing.

Mrs. Carole Lavallée: The same goes for Mr. McTaggart.

In line with this topic, a number of people are saying that, when we pass a bill—I don't think it is going to be Bill C-32—that fights piracy and piracy websites, the pirates, the owners of those sites, are going to set up their sites in foreign countries.

Do you think that Canadian courts will be issuing injunctions? Is it possible that legislation on copyright can provide for injunctions requiring that network providers block foreign pirate sites? Is that possible and realistic?

● (1125)

[*English*]

Mr. Craig McTaggart: The subject of blocking websites is a very difficult one. I note that in the United Kingdom, where they're just developing their Digital Economy Act strategy to deal with piracy, the first stage is to adopt notice and notice, and they're still mired in the details of how to actually develop a notice and notice system. But subsequent stages, I believe, contemplate blocking of content, and on that issue I understand that the government has actually referred the question to Ofcom, the regulator, to study whether it's even possible to do it effectively.

Blocking Internet content is very difficult to do, because it seems there are always ways to work around the blocks. There are always ways for sophisticated Internet users to find what they're looking for. And the very concept of blocking content runs so contrary to a lot of our other Internet policy values that it's just not something that has really been pursued.

[*Translation*]

Mrs. Carole Lavallée: What are the obstacles in blocking foreign sites? Where would the problem be?

[*English*]

Mr. Craig McTaggart: In a number of issue areas regarding Internet content, law enforcement is already actively engaged in pursuing the people who make the content available. I understand that in those areas the content is moved around rapidly. For people who are sophisticated and have the intent to circumvent a blocking regime, there are ways to do it.

For an ISP to do it, again, it's very difficult. There's a technique called "DNS poisoning" whereby you simply take the address out of the domain name system tables. The problem is that it's as easy as changing the domain name to make it reappear. And, again, the people who do this kind of thing are very well versed in how to do that.

Another way to do it is by blocking IP addresses, but that often has unintended consequences because websites often are not the only resident at a particular IP address. Blocking an address will often have collateral damage results to other content on the Internet. That results in a situation of having content overblocked, which, again, is not a result that is generally considered desirable.

[*Translation*]

Mrs. Carole Lavallée: So there are technical difficulties, but there might also be legal challenges. Is that right?

[*English*]

Mr. Craig McTaggart: I expect there may be, but I'm not prepared to speak to them. Those would be freedom of expression issues, and those are broader societal issues.

[*Translation*]

Mrs. Carole Lavallée: Ladies, do you have anything else to add? No.

Let me go back to the notice-and-notice system.

Mrs. Morin, if I am not mistaken, you said earlier that you received one million notices last year and that you were not able to handle them all. Under Bill C-32 in its current form, you will have even more notices.

Have you thought of a solution to hire enough people in order to handle the one million notices, which will most likely go up exponentially in the coming years?

Mrs. Suzanne Morin: If there are obligations under the legislation, we are obviously going to comply with them and make the necessary technical changes. That being said, it doesn't mean there will no longer be notices.

What we are seeing at the moment is that there is no discipline on the market in terms of sending notices. There are no regulations for the format, the content of the notice, the way they should be delivered to us or the delivery address—because they come from all over the place.

So we are hoping that the legislation will help us to instill some discipline in the market. First, notices could be sent on a regular basis, and, as a result, we will be securing the lock-up with our users. We will also be able to tell complainants that we have sent them a notice, which is another obligation.

So, yes, there will be more and more notices. But the legislation is going to instill some discipline. Providers and copyright owners will be working together with the government to establish the regulations for notices. Notices sent to our company and sent elsewhere are not always processed in the same way.

Unfortunately, this is the third bill. We are anxiously waiting for a bill that will enable us to introduce these regulations on the market.

● (1130)

Mrs. Carole Lavallée: And it seems we are heading into an election this week.

[*English*]

The Chair: Merci.

Mr. Angus for seven minutes.

Mr. Charlie Angus (Timmins—James Bay, NDP): Thank you, Mr. Chair, and welcome back, by the way.

Notice and notice, and notice and takedown. This is very serious business in terms of where we're going to go with copyright. We're trying to find a balance here within our committee so that there are no unintended consequences. We look at the United States where we have notice and takedown. On the surface it looks like a very straightforward, reasonable solution. You have a problem, you take it down. But then we see many problems of how it has been used in the United States. There are many issues in terms of copyright overreach and all kinds of anti-competitive things that could be used.

We look to the ISPs to be able to reassure us that notice and notice is the reasonable solution. We have people who want to be able to go after you for lawsuits; you know that. ISP liability—we know groups who will probably be suing again with the SOCAN decision.

And yet I'm hearing a bit of a disconnect. Ms. Dinsmore, you say you're ahead of the curve, and I look at what Rogers is doing. You provide us with information and we can say that's quantifiable; that's something we can work with.

Ms. Morin, you said you guys are waiting and you're filing this by hand.

Mr. McTaggart, you can't tell us if you sent one notice or 100.

I think that's highly problematic. We need the ISPs to give us certainty. Ms. Dinsmore, all kudos to Rogers, but I can't see that in an age when you tell us you're getting a million hits, you can tell us we're still filing it by hand, with the Bell girls with the roller skates on. We need some certainty if we're going to enact legislation, because these things will be going to court and there will be tests. If we cannot say that the notice and notice regime is going to be able to do its job with certainty, then the rights holders are certainly going to be looking to take this to another level.

What assurances are you going to give us? Are you going to wait for the legislation before you act, or are we just going to continue down this road?

Ms. Suzanne Morin: For over 10 years we have voluntarily, and for free, been receiving and processing what we can with the systems we have. Some have automated more; some have not. Originally they were all being processed. But there was also some kind of dialogue with the ISP and the content owner.

We used to seek permission from the content owner so we could let our user know it was this content owner who was making the claim. Before we disclosed their name and their information, we wanted to make sure the content owner was satisfied that, yes, we could pass on the information.

It's something that started with a dozen a month and ballooned. In between we've had three bills. We're on our third copyright bill where we weren't sure exactly what the rules would be.

There are new obligations in C-32 that we continue to support but that we don't do today, and it's never been asked of us: for example, closing the loop with the content owner to say that, yes, we have passed it on; retaining the data about the customer—that's not something we do today, and it's not something we've ever negotiated with the content owner.

With the evolution, with the expectation of a bill, with the expectation to have the industry...we haven't been able to sit down with the content industry and say this is how the notices should be sent to us.

Mr. Charlie Angus: But you guys are like a telecom giant. I mean, I've dealt with people who have sent spurious claims of copyright because they want somebody's site taken down. You don't have a standard to say, "If you're going to make a notice that you expect us to pass on to our consumers, it's going to have to meet this standard, and then you will be assured that if you send another one we will keep track of that." You don't have that protocol in place at Bell?

Ms. Suzanne Morin: You make a very valid point, Mr. Angus. It's been very much a cat-and-mouse game, unfortunately. We'd very much like to get to a place where we can be processing them all, receiving them in a consistent fashion, have government fee schedules so that the appropriate fees are set up, and if they don't come in, in the right format, we can throw them back and say these aren't valid.

It would have been nice if we'd had this discussion eight years ago and we had set it all up. We'd all be doing it right now.

I take your point. But we do hope to have a bill passed one of these days, soon, so that we can actually spend the money. You don't spend money on the systems when you don't know what the rules are going to be.

● (1135)

Mr. Charlie Angus: Mr. McTaggart, you talked about the SOCAN decision, which was one of the major decisions ensuring that ISPs were not held liable because they're not in the position to see what's in the content.

With the use of deep packet inspection techniques, with which the various telecoms have been able to track what is going through the pipes, are you concerned you could be liable down the road for another challenge similar to what SOCAN brought the last time?

Mr. Craig McTaggart: Well, first, on the point of notice and notice, I want to say that TELUS does forward close to 100% of the notices we receive. It's only in cases where we can't match up an address....

You implied that we were maybe not doing what we need to do, but we are doing it. The constraints—

Mr. Charlie Angus: No, I suggested you didn't have any record of whether you sent it once, twice, or a hundred times. I thought that was problematic.

Mr. Craig McTaggart: Right. Perhaps you'll understand that the constraints of our privacy obligations to our customers are such that if we don't have a business reason to retain data, then we don't.

Sorry, could you refresh my memory of your second question?

Mr. Charlie Angus: Well, with the SOCAN decision, you were—

Mr. Craig McTaggart: Right. The quick answer is that we don't use DPI.

Mr. Charlie Angus: You don't.

Madame Dinsmore, are you concerned about deep packet inspection being used? They could say you actually do know what's coming down the pipe, so there would be that issue of third-party liability.

Ms. Pam Dinsmore: We know what protocol is being used, but we don't actually know the content of what's flowing through our pipe. We can't tell whether the bits and bytes are music; we can't tell if it's video. We know if it's peer to peer, in which case we can manage it on the upload, which we do.

We're like the postman who delivers the envelope, but we don't actually open the envelope to see what the content is.

Mr. Charlie Angus: Okay.

I want to ask a question about this new process in the U.S. with the U.S. Copyright Group. Have you been following these John Doe lawsuits? They launched 20,000 lawsuits in the month of March, I believe, and there's going to be another 30,000. They send a lawsuit notice to an IP addresses where they know a notice and notice has been sent about downloading a film. They're calling on the ISPs in the United States to participate in these mass John Doe lawsuits.

Have any of your legal departments looked into the potential implications in Canada and how you would proceed? How would you see yourselves responding to a mass lawsuit mailout to IP addresses? Do you look at that from a legal perspective, from a privacy perspective, from a customer perspective, and from dealing with the rights holders perspective?

Ms. Suzanne Morin: We haven't received any requests like that from content owners.

Mr. Charlie Angus: I'm saying this is what's being done in the United States. You're not looking over the border to say that could be used here and we'd be having to participate in that?

Ms. Suzanne Morin: Well, typically when you go to court a plaintiff would reach out to a third party. We're an uninterested third party, so typically a plaintiff would reach out to us in advance of that. We haven't received any requests or any motions to go to court on that.

Mr. Charlie Angus: Have you watched what's happening in the United States—

Ms. Suzanne Morin: We do watch what happens in the United States.

Mr. Charlie Angus: —with the John Doe lawsuits? Would you see that the regime in Canada would allow for those kinds of mass mailings of lawsuit threats to IP addresses?

Ms. Suzanne Morin: I don't know.

The Chair: All right. We're out of time.

Mr. Charlie Angus: Thank you.

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

We'll move to Mr. Del Mastro for seven minutes.

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

And thank you to the witnesses today.

I appreciate that all three of you have indicated your support for the passage of Bill C-32 in a timely manner. I think that's important.

I think all of you provide necessary service to businesses and to households across the country. As such, your voice before this committee is very important. I have a number of questions, which I'll get to.

Ms. Dinsmore, one thing in your presentation was network PVRs specifically. I'm interested in that because the bill is written intentionally to be technology neutral. I support network PVRs. I think it's a great idea, to reduce waste and also to provide consumers more choice. It also opens up opportunities for television networks to get more revenues. As I understand it, they can switch out advertisements and so forth—revenues from advertisers.

Why have you specifically highlighted them? Is there something in the bill that you think may not provide for their use?

Ms. Pam Dinsmore: Thank you for that question. We are very pleased that the minister has expressed the government's intention to introduce network PVR services and cloud computing. We think that's a great innovation and we're all for it. We also think it's very clear that when a customer makes a copy using a PVR or even an NPVR and stores it, that's covered off in the bill. I guess what we're concerned about is that the government's intention be very clear and understood by all.

We are members, again, of the BCBC. They have actually brought forward proposed draft wording changes that would make some recommended changes to the hosting provision. What that would do is this. It would clarify that when a subscriber to a network PVR or a cloud computing service retrieves its stored content, it doesn't trigger any further copyright liability like communication to the public by telecommunication. So we think that if you adopted the changes that have been proposed by the BCBC, this would make it crystal clear that this is not the intent.

● (1140)

Mr. Dean Del Mastro: Just assuming that for network PVRs or cloud computing...would you support, then, the government's rationale for allowing technical protection measures to be used at the discretion of the rights holder?

Ms. Pam Dinsmore: On technical protection measures, we totally agree with the prohibition against breaking access copy controls. When it comes to the other types of locks, the other copy controls, we're concerned that when somebody has actually acquired copyrighted works, they be able to use that work to format shift, time shift, make backup copies. So with that, our position is that this should be allowed under the bill.

Mr. Dean Del Mastro: Okay, very good. Thank you.

We've heard presentations from certainly the recording industry, the film industry, and the entertainment software industry, all of which have very significant footprints here in Canada. They're very important industries with billions of dollars of revenue. Tens of thousands of jobs have been wiped out. We heard the chamber of commerce speak to that as well. The Canadian Council of Chief Executives spoke to it as well. It's very important, obviously, that we move in this regard and move forward with it.

But we've been bogged down on a couple of debates that I think have held up the committee. Specifically, one would be the proposed digital copying levy, or the iPod tax, as we've coined it. Have your organizations taken a position on that? Specifically, I'm interested since most of the devices that you're now selling, smartphones, for example, and many of the other devices that you would market, would most certainly be hit by such a levy. What might your position be on it?

Mr. Craig McTaggart: Yes, that is something that at TELUS we have a view on. I'm going to speak to three major problems with extending the private copying levy to devices, and I'll characterize them as double charging, the smartphone problem, and the fact that it sounds like giving up on fighting piracy.

First of all, with respect to double charging, as has been mentioned before this committee before, when a consumer downloads a track from an online music service such as the TELUS music shop or iTunes, the tariff approved by the Copyright Board that governs the consumer's use of that track permits the consumer to make further copies on a device. So the consumer has already paid; the rights holders have already been compensated for that kind of use. If you create an additional fee meant to get at the same use, it sounds inequitable to me.

The second concern I have, and you alluded to this, is with respect to smartphones. It's very difficult to define what would be a digital audio recorder, a digital audio device. What concerns us at TELUS is that a lot of the devices that we sell are multi-function devices and could be caught by that definition. If a per-gigabyte fee is added onto those devices, then suddenly the retail price of the devices we sell, which are not primarily for music or media, although they're used for all sorts of things, suddenly goes up. That has negative consequences in a number of ways.

Third, what concerns me about that kind of approach is that it sounds like throwing in the towel. Implicit in my remarks today is that what TELUS likes about this bill is that it goes after the bad guys. It seeks to stop the source of illegitimate content at its source and those who actively enable it, while at the same time enabling functioning markets for legitimate licensed content. We are in the licensed content business. We want that business to flourish.

That's the two-pronged approach that TELUS sees as particularly powerful in this bill. To adopt an approach that gives up and adopts an arbitrary charge that increases the prices of consumer products is not one that we would recommend.

● (1145)

Mr. Dean Del Mastro: Do you agree, Ms. Dinsmore?

Ms. Pam Dinsmore: Rogers is in full agreement with TELUS' position.

Mr. Dean Del Mastro: Ms. Morin?

Ms. Suzanne Morin: Likewise, yes.

Mr. Dean Del Mastro: Okay, that's great.

The next thing I wouldn't mind getting an opinion on is this. There has been some suggestion that in some places the intent of the bill may not be matched by the effect of the bill, and I think you've recommended a couple of technical amendments. Have you forwarded those to the committee?

Ms. Pam Dinsmore: Our amendments have all been forwarded through the BCBC submission.

Mr. Dean Del Mastro: Thank you very much.

The Chair: Mr. Del Mastro, that's going to have to be it.

Mr. Dean Del Mastro: The time is up? Thank you.

The Chair: We'll now move to the second round of questioning, to the Liberal Party, Mr. Rodriguez, for five minutes.

[*Translation*]

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

Good morning and welcome.

Mr. McTaggart, on the one hand, you are saying that the notice-and-notice system is enough. On the other hand, you have no data. What are you basing your comment on?

[*English*]

Mr. Craig McTaggart: Well, when I say that notice and notice is enough, to put it that way, it's in the context of the other measures in the bill. If you were focusing on notices sent to consumers as the sole means to control online piracy, that might be a problem. But what the bill does is it creates tools for rights holders to enforce their rights directly against those who are making their works available on the Internet and to try to shut down the enabler sites, which are the ones that are making it possible to do this.

But with respect to whether notice and notice is enough, in a sense, implicit in that statement is that other alternatives are unpalatable. But I'll turn it back to you.

[*Translation*]

Mr. Pablo Rodriguez: You are saying that the other options are not realistic. Do you have any data on this topic, yes or no?

[*English*]

Mr. Craig McTaggart: Well, again, we haven't defined what we're talking about, but other measures that have been proposed include notice and takedown with respect to hosted content, or notice and termination, or graduated response with respect to individuals who are alleged to have file shared, and as you can imagine, it's an issue that we spend a lot of time thinking about.

So when I say that graduated response-type regimes are unpalatable, my primary concern with them is that they are generally built on the principle of an extrajudicial remedy. They essentially would empower rights holders to achieve remedies against individual consumers without a court ever determining that rights have been infringed. That's our main concern.

With a graduated response type of regime, of which there are many proposed flavours, a common thread is that a rights holder sends a notice to an intermediary and the intermediary takes some kind of sanction against its customer without the middle step of a court or an official body ever determining fault.

[*Translation*]

Mr. Pablo Rodriguez: Okay.

Ms. Dinsmore, you said that roughly 5% of your clients get a notice. Does that mean that 95% of your clients comply with all the regulations?

[*English*]

Ms. Pam Dinsmore: They simply don't get notices that are directed towards their households.

[*Translation*]

Mr. Pablo Rodriguez: Do you think that 5% is the actual number of people who download things illegally, or are there many who get away with it, without receiving anything?

[*English*]

Ms. Pam Dinsmore: I have no way of knowing that.

[*Translation*]

Mr. Pablo Rodriguez: That's the crux of the problem. You are telling us that notice and notice is enough, but, on the one hand, you have no data, and, on the other hand, you are not able to tell me whether the 5% is representative or not. At Bell, you use envelopes to communicate with your clients.

Yet you insist that notice and notice is enough. I am not an engineer, but I would like to have data to rely on, and we don't.

Would you consider other systems that might have more teeth and address the whole bill? Or is this the only option for you?

[*English*]

Ms. Suzanne Morin: Maybe I could clarify, Monsieur Rodriguez, when you talk about “envelope”. When we say we do it manually, it means the notice is actually viewed by someone electronically, linked up to the customer, and then someone hits the “send” button. We don't actually send a letter to the household, even though content owners might actually prefer that.

Maybe I could throw the question back at you and other content owners. What we actually see around the world when it comes to peer-to-peer file sharing, because there's nothing to take down...I don't know what's on a user's computer. None of us knows what's on users' computers, so there is nothing to take down. Around the world they're struggling with what do we do with peer-to-peer file sharing.

Right now the only and the best thing that has been working is someone letting you know that someone else is infringing, so we pass on the notice.

● (1150)

[*Translation*]

Mr. Pablo Rodriguez: With all due respect, isn't it sort of easy and doesn't it somewhat suit you to say that you don't know what a computer has in it? That limits your responsibilities. We often hear telecommunications companies say that they are just a channel. Yet your ads are not about how nice or big the channel is, but rather on how fast downloading is, how many videos are available, and so on. You are using the content provided by the creators. You also say that you have no responsibility. I find that hard to accept. That being said, I am well aware of your technological constraints.

But I think, as a group, you have some responsibility that you do not want to assume .

Ms. Suzanne Morin: I don't think we...

[*English*]

The Chair: Thank you. We have to move on.

[*Translation*]

Mr. Cardin, you have five minutes.

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

Good morning, ladies and gentlemen.

In some ways, you are all in support of the government's initiative and you're applauding its balanced approach in terms of both copyright and users, an approach that allows digital services to expand and more investments to be made in innovation.

In terms of innovation, I am wondering how we can innovate in order to control all this. You said earlier that you have received tons of notices and the number is constantly going up. As several people said earlier, there is no data on these notices. We also don't know how many of them actually protect copyright.

I think Mr. McTaggart said that you don't see royalties as a positive thing. But royalties are not an authorization to copy products illegally.

You are saying that it would no longer be possible to fight against offenders if royalties are involved. But the two can coexist. You are also saying that there will always be someone to manipulate the technology to make downloading, copying and whatnot possible.

I think you are major players. But you seem to look at all this from a distance. You seem to make your interests a priority, of course. In terms of everything else, you are waiting to see how things will turn out once the legislation is passed.

If we had to vote on the bill today, would you support it in its current form, without changes being made based on your recommendations?

[*English*]

Mr. Craig McTaggart: TELUS does have some recommendations, but they're relatively minor. They're focused on making the notice and notice system work better, more efficiently, and more fairly for all the stakeholders involved. As I have also indicated, we recognize the concerns on the part of some rights holders that the provisions designed to protect innocent intermediaries may be drafted too broadly. They may allow not-so-innocent intermediaries to slip in underneath them. That's not a desirable result, so we would certainly be open to amendments designed to tighten those up.

Beyond that, on what I consider to be the one-two principle behind this bill, on digital copyright issues, at least, you arm rights holders to enforce their rights directly against those who are infringing on them and you enable robust markets for legitimate licensed content. Those are the two steps this bill takes that will improve the lot of everybody involved.

● (1155)

Ms. Pam Dinsmore: I would add that notice and notice is not a silver bullet; it's just the first step in a process by which rights holders can go after those they allege are infringing. The role we play through notice and notice is to send the notice off to an alleged infringer on behalf of the rights holder. Then the rights holder can use that when they decide to take that alleged infringer to court.

We are an essential part of the process, but we can't make the whole process work by ourselves. There's a responsibility on the part of the ISP, and a responsibility on the part of the rights holder. We believe that the act very clearly defines the role of each player and stakeholder in the overall copyright regime.

[*Translation*]

Mr. Serge Cardin: Ms. Dinsmore, I would like to quote you. In your presentation, you said the following: "In our view, notice and notice is the best and fairest way to make individuals aware that they are accused of illegal peer-to-peer file sharing..."

You went on to say: "...while recognizing that ISPs should not unduly interfere with our customers' online activities."

What do you mean by that?

[*English*]

Ms. Pam Dinsmore: The role we play is to send the notice on to the alleged infringer. We're not making some sort of determination that our customer should have their service terminated. That decision has to be made by the courts. The courts have to determine, with the information put forward by the rights holder, whether that alleged infringer actually is infringing. If the court makes that decision, then we will always follow a court decision or a court order, but we are not in a position to make that decision.

The Chair: Thank you.

Mr. Braid, you have five minutes.

Mr. Peter Braid (Kitchener—Waterloo, CPC): Thank you very much, Mr. Chair, and thank you to our presenters for being here this morning.

I'm going to focus on notice and notice as well, and I would like to have the opportunity to ask each of you a question.

I'll begin with you, Madame Morin. In a response to an earlier question, you mentioned that the notice and notice protocol has been in place for about a decade. Do you know how the protocol was first developed, what the genesis was, who was involved in creating it? Could you elaborate on that?

Ms. Suzanne Morin: At a voluntary level, there were discussions between part of the content industry and the Canadian ISP community, both cable ISPs and—

Mr. Peter Braid: So rights holders drove it?

Ms. Suzanne Morin: —rights holders, together with Canadian ISPs. No agreement per se was ever achieved, but rather a sense from some Canadian ISPs that if we receive them, we would pass them on. There was no MOU or anything signed. We didn't even agree on the content of the notice, but rather if we receive them, we would make best efforts to pass them on.

Mr. Peter Braid: You were open to that discussion, and through collaboration with rights holders you put this system in place. Is that fair?

Ms. Suzanne Morin: It happened just as I said. There was no more to it than that, no discussion about form or anything.

Mr. Peter Braid: Great. Thank you.

Madam Dinsmore, I have one question to start. You shared some very compelling statistics about the notice and notice experience at Rogers—how many customers it really impacts; a very small number. Could you table that data with the committee? Would you be prepared to do that?

Ms. Pam Dinsmore: Yes, I would.

Mr. Peter Braid: Great. Thank you.

Secondly, one of the concerns we heard about is that the notice and notice regime doesn't have an escalating response. But in your presentation, you state unequivocally, and I'll quote, "It does result in discouraging repeat offenders." Could you just elaborate on that, please?

Ms. Pam Dinsmore: That's the information we get from our tracking, because we know that the numbers, as I said before, decline exponentially with every additional notice going to a household. So the number of people getting a second notice is a third of the number of those getting one notice. To give you hard numbers, it goes from 70,000 to 21,000, to 8,000 on the third notice, down to 4,000 on the fourth notice, and down and down. Then we get to the number of households getting 33 notices—two households get 33 notices. There's a ladder effect, but it's downward escalating.

● (1200)

Mr. Peter Braid: Thank you very much.

In your presentation, you also seem to imply that notice and notice is being looked at in other jurisdictions. Am I hearing this correctly? Is this an evolving protocol that other jurisdictions are looking at?

Ms. Pam Dinsmore: Yes, it is. The Hadopi system in France that many people refer to is a system where the ISPs, if they get a notice from a rights holder, send that notice to the agency, Hadopi, who then sends the notice on to that ISP's customer, so there's now an intermediary. But it's a graduated response, but it's a notice and notice regime. Ultimately, a judge makes the determination as to whether or not that person is infringing the rights holders' copyright.

Mr. Peter Braid: Thank you.

Finally, Mr. McTaggart, you've stated your position very clearly—and eloquently, I might add—with respect to a proposed iPod tax, which, as you know, the government is very squarely against. One of the other proposals we've heard out there from other constituents, the same constituencies that seem to support a possible iPod tax, is this notion of an Internet tax or an ISP tax, which we on this side are also squarely against. Could you comment on that proposal?

Mr. Craig McTaggart: Well, the principles that explain why it wouldn't be a good idea are very similar with respect to digital devices: you're putting an arbitrary fee on top of a general purpose technology or a general purpose service that Canadians use for all sorts of purposes. It effectively punishes those who don't use the Internet for one purpose in an attempt to make up for the wrong caused by a very small number of people who do abuse it.

Remember that a lot of people use the Internet to acquire legitimately licensed entertainment products. We provide a general purpose platform that we keep making better and better so that people can use those services. If it has the unfortunate effect of providing better and better access to illegitimate services, well, that's not an intended consequence. But that's why it's so important to go after those illegitimate services and shut them down.

The Chair: All right. Thank you very much. That is the last of this round.

I'd like to thank our witnesses for coming.

We will suspend for a few moments and come back with our second hour.

● (1200)

(Pause)

● (1205)

The Chair: I will call this 19th meeting of the Legislative Committee on Bill C-32 back to order.

In the second hour we will hear from Arash Mohtashami-Maali, from the Canada Council for the Arts; from the Canadian Federation for the Humanities and Social Sciences, we have Jay Rahn; and from the Canadian Library Association, we have Victoria Owen and Kelly Moore.

Each organization will have five minutes. I'll go in the order of the sheet.

We'll start with the Canada Council for the Arts for five minutes.

[*Translation*]

Mr. Arash Mohtashami-Maali (Head, Writing and Publishing, Arts Disciplines Division, Canada Council for the Arts): Thank you, Mr. Chair.

My name is Arash Mohtashami-Maali, and I am the Head of the Writing and Publishing Section at the Canada Council for the Arts. As an introduction to this presentation, I would like to give the members of the committee a brief description of the Canada Council and its mandate.

The Canada Council is a Crown corporation that was created by an act of Parliament in 1957 to “foster and promote the study, enjoyment and production of works in the arts”.

Our mandate is to help Canadian artists and arts organizations play a leadership role in Canadian society. Our role is to help our society to access its arts and culture and to engage with these leaders in building a better society based on such fundamental values as freedom of expression, the right to difference, and the right to a unique identity within a plural society.

This is the spirit and vision that we are bringing to our presentation to the committee, in order to share with you our ideas on Bill C-32. We understand perfectly the need for a reform of the Copyright Act. It is obvious that defining a legal framework for this subject within the larger conversation on intellectual property reinforces the commitment to focusing particular attention on the needs of artists and the arts in Canada. We applaud this effort, all the more so since new technologies and globalization, together with the influence of the Internet and new media, have not only contributed to the disappearance of physical borders, but have also made possible the universalization of ideas and literary and artistic creation, and the introduction of new working media for creators.

We have seen the effects of piracy in the arts, especially in the fields of music, film and literature, and it is time to equip the Canadian justice system with the necessary legal tools to protect the interests of authors and artists in Canada.

We all agree that the act must take to heart the protection of the arts and literature in Canada and must ensure the right to an identity that is both distinctive and diverse. This act has to support the best efforts of our artists, writers and intellectuals and their desire to maintain close ties and open dialogues with today's world, building a place of choice for Canadian culture and guaranteeing its survival.

We also wish to thank the committee for listening attentively to the different stakeholders representing the many artistic and cultural communities concerned. It is heartening to see that the bill is being given special attention thanks to this consultation.

Our unique perspective on Canadian creation and our profound understanding of this community mean that we have a privileged contact and first-line responsiveness for hearing the needs and the reaction of the arts communities regarding Bill C-32. We believe that this act, inextricably bound as it is to the fundamental values of our society, must play a unifying role. While it must reinforce in an ethical manner the role of the artist by recognizing his rights, it must also ensure the continuity and fair treatment of independent agencies, corporations and institutions.

As we mentioned earlier, the artistic and literary communities want an inclusive act with legal tools that not only respond to the current changes, but also includes those measures which, over the years, have protected intellectual property in the arts. While new realities have transformed the arts world, the traditional means continue to make up the bulk of the market.

The Canada Council is not a legal expert, but we understand the concerns of the different arts communities. We understand that the introduction into the act of such ideas as 'fair use' is a source of discord and disagreement within the arts community. Every day we witness the preoccupations within these communities, as they express their reservations about the application of these new ideas. We believe that the introduction of a more precise definition would help them come to a better understanding of the position of the act with regard to the rights of individuals and organizations.

We appreciate the declaration in the preamble to the act (paragraph 1) stating that this act is “an important marketplace framework law and cultural policy instrument that, through clear, predictable and fair rules, supports creativity and innovation and affects many sectors of the knowledge economy”. We are confident that the present efforts of the government and Parliament will ensure that Canadians benefit from an act that is progressive and far-sighted, an act that is open but also solid, and that will protect Canadians and their interests. We agree that clarity is the key element of an act that is vital to the cultural survival of our country. We support the effort to establish an act that unifies our citizens around the basic principles of our constitution, and we support the idea that this act must give artists, writers and thinkers “the ability to assert their rights...”

Thank you, Mr. Chair.

● (1210)

[*English*]

The Chair: Thank you very much.

We'll now move on to the Canadian Federation for the Humanities and Social Sciences for five minutes.

● (1215)

Mr. Jay Rahn (Chair, Copyright Committee, Canadian Federation for the Humanities and Social Sciences): Thank you, Mr. Chairman, for inviting the Canadian Federation for the Humanities and Social Sciences to participate in your study of Bill C-32 to amend the Copyright Act.

I am Jay Rahn, chair of the federation's task force on copyright. The federation represents more than 50,000 members who work in Canada's libraries and museums and who teach and undertake research and creative work in Canada's universities. On their behalf, I commend your initiative to modernize copyright legislation. Forward-looking copyright policies will help researchers and creators leverage opportunities that digital technologies present while ensuring copyright owners are fairly compensated. I assure you that our community commends several of Bill C-32's proposed amendments, in particular the addition of education to the list of fair dealing exceptions and the expansion of fair dealing to include parody and satire. We also appreciate the challenge of shaping legislation that incorporates feedback from multiple parties and serves the public good. However, we believe some areas of the bill would greatly benefit from minor adjustments. We did not aim these adjustments at avoiding certain costs in producing teaching materials. Indeed, educators believe that creators, a group that includes many teachers, should be fairly compensated for their work. This is intrinsic to copyright. Recent figures show that Canadian university libraries, for example, spend over $300 million annually, as the committee is already familiar with, to buy and license new content for research and learning.

Our written submission identifies several changes to areas that may create unintended barriers to access or result in avoidable problems of compliance. But for the purposes of this presentation I will review the two most important aspects of the bill for our community.

First, the phrase, “such as“ or “ including, but not limited to”, should be added in the list of fair dealing exceptions to make it suggestive rather than exhaustive. In this regard, we support the inclusion of the fair dealing exception for education. The Supreme Court of Canada has set out factors to help determine if copyrighted materials have been used fairly. These factors were in fact applied in a recent Federal Court of Appeal case that upheld a decision that prescribing multiple copies of a work to a class of students would be unfair. Adding education to fair dealing does not spell the end of publishing. Instead, it could further facilitate the use of Canadian material in classrooms across the country. For example, a professor could podcast a lecture that includes a copyright-protected image without unduly worrying about copyright infringement. We need to ensure that copyright law punishes pirates, not educators trying to teach new content in new ways.

Second, we feel that the language concerning technological protection measures, TPMs, should be amended so it is not an offence to circumvent a TPM for actions that are otherwise non-infringing. This revision, we believe, is consistent with the 1996 World Intellectual Property Organization Internet treaties that Canada has signed. If the digital lock provisions remain unchanged, Bill C-32 would make it an infringing act for anyone, teachers, consumers, and even creators, to break a digital lock for all but a few purposes. For example, those who simply want to shift scholarly articles between devices and formats would be in contravention of the bill. It would also punish creators who increasingly use copyrighted works as a basis for their novel expressions in follow-on works. We believe these changes would result in an act that would better help Canada meet future digital challenges and seize opportunities both domestically and internationally.

Thank you for the opportunity to discuss our views. I welcome your questions.

The Chair: Thank you very much.

We'll move on to the Canadian Library Association for five minutes.

Ms. Victoria Owen (Chair, Copyright Committee, Canadian Library Association): Good afternoon, and thank you, Mr. Chair.

My name is Victoria Owen, and I'm the chair of the Canadian Library Association's Copyright Committee. With me here today is Kelly Moore, who is CLA's executive director.

We greatly appreciate this opportunity to meet with you today in the context of your study of Bill C-32. I'm currently the head librarian at the University of Toronto's Scarborough Library, and I have been the director of a public library and the director of library services at a library for the print disabled. In all of these environments copyright legislation has had a direct impact.

● (1220)

Ms. Kelly Moore (Executive Director, Canadian Library Association): CLA is Canada's largest national library association. We represent the interests of approximately 57,000 library staff and thousands of libraries of all kinds across Canada, as well as the interests of all those concerned about enhancing the quality of life of Canadians through access to knowledge and literacy.

Our role is to represent the interests of these organizations and individuals on a range of public policy issues. None is more critical at this time than copyright.

Library users are the Canadian public. There are millions of students, educators, scholars, researchers, lifelong learners, special library users, and recreational readers—from children to seniors. When it comes to copyright, our users are not members of a special interest group. The public interest is the core of our work.

A copy of CLA's brief on Bill C-32, “Protecting the Public Interest in the Digital World”, has been submitted to the committee members and fully discusses CLA's views on the bill. Today we will highlight the key issues as they relate to the library community.

Ms. Victoria Owen: CLA applauds the Government of Canada for the significant improvements to Canada's copyright regime in Bill C-32. The addition of education, parody, and satire in the fair dealing section of the act are important additions to our national information policy. Education, parody, and satire stand beside other fair dealing uses, which are limited and specified and, above all, fair.

The Supreme Court identified the fairness test, and librarians have interpreted this carefully and cautiously. The fair dealing exception for education must recognize libraries of all types as well-respected cultural and educational institutions and recognize that they are integral to the provision of collections for research and private study for all Canadians. Education and lifelong learning are conducted in earnest in public libraries across the country. Educational institutions, by definition, must include libraries of all types.

CLA is seeking further improvements to the bill, which will benefit all Canadians. Of concern to CLA are the unnecessarily prescriptive protections for digital locks, particularly as they dramatically limit and reduce the impact of the important exceptions for fair dealing, access for people with perceptual disabilities, and preservation of library materials. We join our colleagues at other Canadian cultural and educational organizations in this concern.

CLA supports the fundamental principle of fair dealing in Canada's copyright bill. We do not want to hamper Canadians' ability to fully utilize their statutory rights—for a very limited number of exceptions—by the imposition of technological protection measures. Any copyright legislation must include the right to bypass digital locks for non-infringing purposes. Without this right, the legislation is fundamentally flawed.

Digital locks can prevent people from copying for the purposes of fair dealing, thwart library preservation of materials, and interfere with access to content. Each and every section of the bill that affects access for people with perceptual disabilities must be reviewed in order to ensure that we do not make equitable access more difficult or in fact impossible.

CLA members acknowledge the complexity of copyright in the 21st century. Libraries annually purchase content worth millions of dollars, librarians serve Canadian creators and users, and we see the balance between copyright and users' rights every day.

The library community plays a vital role in providing Canadians access to all forms of knowledge. Access to information is essential to ensure that Canadians are contributors to the economic, social, and cultural well-being of their communities.

We appreciate the Government of Canada's attempt to define the balance among the concerns of creators, content providers, and users as a key goal of continuing copyright reform. The bill has succeeded with fair dealing in adding preservation and in limiting liability, but digital locks on the statutory rights of Canadians undermine so much of the bill's progress in the digital environment.

We would like to thank you again for this opportunity to speak to you.

The Chair: Thank you very much.

We'll now go to questioning.

From the Liberal Party, Mr. McTeague.

I understand you're going to split your time.

Hon. Dan McTeague (Pickering—Scarborough East, Lib.): Yes, Chair. You've indicated one round given the time constraints, so I will be sharing my time with Mr. Rodriguez.

Witnesses, thank you for being here, especially those from Scarborough.

Mr. Rahn, if I could, I want to begin with you. In your submission, you laud the addition of education to fair dealing—I'm going to quote here—as it permits "educators and students to make greater use of copyright material". There are, in my view anyway—and certainly the committee has heard this—a number of very appropriate collective licensing agreements that accomplish very much the same thing. At the same time, it will compensate creators.

So I'm wondering if I can get from you, perhaps more definitively, whether you believe education should have the use of creators' content for free. Is this what you're suggesting?

● (1225)

Mr. Jay Rahn: I don't think I'm suggesting that. For example, libraries will still purchase books, and they will undertake licence agreements with organizations that service them. I wouldn't restrict the discussion to collective licensing per se. There is also the matter of individual copying for the purposes of research, private study, criticism, and review, which is currently subject to a licensing regime, although that's been disputed ever since it was first introduced several years ago.

I'm not sure that I've begun to answer your question.

Hon. Dan McTeague: No. You have no difficulty with collective licensing systems per se. It's other areas that you wish to introduce.

Mr. Jay Rahn: I think they're more germane, especially to the highly special function that universities serve, which is research. This then turns into teaching materials and so forth.

Hon. Dan McTeague: One final question for you. Your submission also puts some emphasis on the fact that you would prefer not to have any monitoring or reporting of the use of digital materials in education, such as library environments. You would actually suggest here that you want to be able to remove TPMs for non-infringing purposes. I'm going from what you've said here.

How would you propose that the further use of these materials be determined and managed by their creators if they are used for other purposes beyond the limitation of the exceptions?

Mr. Jay Rahn: In that case we were responding to the portion of the bill that would give collective licensing agencies the ability to enter into the computer systems of universities, take a look around, audit, and check on what might be at intranet services within a particular course to see which items they claim are in their repertoire and might be used.

As I mentioned in our written brief, one big problem with that is the alarm bells would go off among the professorial community that academic freedom is potentially being infringed. For such a long time we've had the practice within universities that our employers—university administrations who would be part of such a monitoring system—do not check up on what we're taking out of the library, what goes on in our classrooms, and so forth. In fact the origin of another group that was here before the committee, the CAUT, goes back to a very famous case of academic freedom where a professor who actually became dean of the college that I worked in at York was punished by his university principally on ideological grounds.

My president has no need to know whether I read Adam Smith or Karl Marx.

Hon. Dan McTeague: All right. I appreciate the clarification.

I'll pass this over to Mr. Rodriguez for the little time we have left.

The Chair: Mr. Rodriguez.

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

[*Translation*]

Good afternoon. Thank you for being here.

I am going to read you an excerpt:

[*English*]

> Extending this provision to education will reduce administrative and financial costs for users of copyrighted materials....

That's on the fact sheets on C-32 that come from the government. If the costs are reduced, some people will get less money, right?

[*Translation*]

If you pay less, and if schools pay less, someone will be getting less money. So who are we talking about here? Are we talking about creators?

[*English*]

Mr. Jay Rahn: First, I don't think there will be any change in the revenues of publishers who were in the business of publishing textbooks, for example. That would be ineffective, as far as I can tell.

There's another regime where maybe collective licensing agencies should not have been given money over the years. In regard to that, I'm referring to the point I made earlier about contests between university administrations and a particular collective licensing agency over what constitutes fair dealing. Those revenues might disappear at that point, but maybe they should never have been expended in the first place.

● (1230)

[*Translation*]

Mr. Pablo Rodriguez: This bill would help you to ensure that the revenues will not be collected by those agencies. That's what you said.

[*English*]

Mr. Jay Rahn: Could you repeat that again? I'm sorry, I missed the translation.

[*Translation*]

Mr. Pablo Rodriguez: So you are telling me that you would no longer have to pay out that money under this bill, as mentioned earlier.

[*English*]

Mr. Jay Rahn: Yes. These revenues are not that high compared to the textbook-related and course-pack revenues, in any case. The amount that was cited earlier in this committee is approximately $3.50 a student. The prospect of it being raised to $45 a student to cover all the other things has been withdrawn in the meantime.

[*Translation*]

Mr. Pablo Rodriguez: Don't you think a risk is involved if we merely include the word "education"? Don't you think that, if we keep it defined or limited, for example...

This question is for both of you. In your view, what is the definition of the word "education"?

[*English*]

Mr. Jay Rahn: I know this question of the definition of education has arisen before. But actually, I would make an ideal bill much broader than being restricted to merely adding education to that list of fair-dealing exceptions—

Mr. Pablo Rodriguez: So you would add even more stuff.

Mr. Jay Rahn: —and the people on my committee would as well. In fact, we suggest, and I reiterated that this morning, the notion of having "such as" or "including, but not limited to" preceding the list of fair-dealing exceptions. I think there are a lot of good reasons for doing that, rather than just adding on—

[*Translation*]

Mr. Pablo Rodriguez: If we include everyone, what good will any copyright legislation do?

[*English*]

Mr. Jay Rahn: No, it's not a matter of including everyone. I think what you have to do is seek a principle that unites the ones that exist. For example, parody, satire, news reporting, criticism and review, and private study research all have a common thread to them with which education itself is quite consistent.

[*Translation*]

Mr. Pablo Rodriguez: I would like to close with you, Mr. Maali.

You work a lot with creators and artists. Those we have heard from have almost to a person said that they are very concerned about the potential loss of revenue and rights. Do you share their opinion?

Mr. Arash Mohtashami-Maali: We have heard that, but we have ties with many other organizations, including libraries. We are in a delicate position because our clientele is divided.

Yes, we are concerned about those numbers. I believe you have heard it from other witnesses. We share the same concerns.

The Chair: Thank you.

Mrs. Lavallée, you have seven minutes.

Mrs. Carole Lavallée: Thank you very much.

Mr. Rahn, Ms. Owen and Ms. Moore, it is surprising to see you supporting fair dealing for education whereas, in Quebec, the approach is very different. You say you are representing the Canadian Federation for the Humanities and Social Sciences and the Canadian Library Association, but there is another viewpoint in Quebec, completely different from yours. First and foremost, the Assemblée nationale du Québec was unanimously against Bill C-32-in its present form, and particularly against the broader education exception suggested under the bill. The minister of culture, Christine St-Pierre, was against it too. The minister of education—that's quite something—said:

> In Quebec, the government wants to make sure that creators get what's fair for their works being used by third parties, especially by schools. Quebec's position that the right to education and the rights of creators go hand in hand is in line with the guidelines set out in the 1980 creators' fair share policy by the ministère de la Culture et des Communications.

I won't mention the Fédération des commissions scolaires du Québec. I will skip that and go to the Association des bibliothécaires du Québec. One of its representatives said the following:

> Why have Quebec's public libraries taken a position opposite to that of the other provinces? Extending fair dealing and any other exceptions will result in a loss of revenue for authors and other rights holders. If we broaden the scope of these exceptions, as you suggest, the loss of revenue could be quite significant. Isn't this a funding issue rather than an access or fairness issue? Public libraries are certainly underfunded, but should authors be paying for that?

That's how it is everywhere in Quebec. There is also BIBLIO du Québec, another organization that is against fair dealing. Whatever you say, fair dealing, as defined under the bill, means a loss of revenue. It would be even worse if we added the infamous "such as", as Mr. Rahn suggested. That's basically where we are headed. Yet, in Quebec—unlike the other provinces in Canada, it would seem—we have a great deal of respect for creators, for compensating creators and for our young people. As a result, we want to teach our young people about respect for creators and our duty to compensate them.

Mr. Rahn, you are saying that a professor is entitled to show students something through any digital media. That's true if the professor has the creator's permission and the creator is compensated. The creative work belongs to the creator. Mr. Rahn, if I want to come and visit your house, I will ask for your permission and I might even pay for the visit. It's the same thing: the creative work belongs to the creator. If we want to have a vibrant culture, it is even more important for young people to be aware of that, recognize it and compensate the artists.

You may comment.

● (1235)

[*English*]

Ms. Victoria Owen: Thank you very much, Madam Lavallée.

From the perspective of the Canadian Library Association, I think education, parody, and satire join the other exceptions to copyright because they're very limited, specific, and fair. To be defined as exceptions, they cannot interfere with the economic interests of the creators. They have to be constrained. They have to be for specific uses. They have to be constrained by all of the six factors that the Supreme Court laid out. They mustn't significantly interfere.

I also think it's part of the initial balance of copyright on striving to achieve a balance between access and protection of the economic interests of the creators.

[*Translation*]

Mrs. Carole Lavallée: I'm sorry, but there is no access problem. You can access all the information you need when you are a teacher or a student. The problem is compensation. Artists have to get paid, if we decide to use their works.

[*English*]

Ms. Victoria Owen: The access I was referring to was the access to making limited specified copies of a material under constrained conditions. That's the access I was talking about, not that they weren't available.

[*Translation*]

Mrs. Carole Lavallée: That's possible if you pay, which is normal because artistic works belong to their creators.

[*English*]

Ms. Victoria Owen: For libraries in Canada, I don't think there has been any problem. We have significant collections. We've spent an enormous amount of money, and we have spent a lot of time protecting the rights of creators. It is a small sliver of exceptions, and we try to manage them responsibly and cautiously.

[*Translation*]

Mrs. Carole Lavallée: That probably goes hand in hand with fair dealing, as described in the bill. Things will end up being sorted out in court, which will take years and artists won't get paid during that time. That's what fair dealing is.

In addition, if you compare that with what is happening in the United States, your comparison will automatically be flawed. The criteria used to determine fair dealings in the United States are not the same as those used by Canadian courts, if we look at the case law.

[*English*]

Ms. Victoria Owen: No, the American doctrine is fair use, and ours is fair dealing. The American is "such as", and our law does not have "such as". It's very limited to the specified exceptions, and it's a very narrow range of applications that we can use it for. It's very prescribed. If you go through all those six steps that the Supreme Court has laid out for us, you will see that what people are afraid of just could not happen. They are constrained by those six tests.

● (1240)

[*Translation*]

Mrs. Carole Lavallée: But case law in Canada ensures that, on the contrary, fair dealing is assessed based on much broader criteria and based on the rights of users, and they don't have that in the United States. We wouldn't get the same results, because American judges do not use the same criteria and the situation is different. In Canada, when legal action is taken under the section on fair dealing, the results won't be the same as in the United States. Anyway, this section opens the door to a wide range of lawsuits.

The Barreau du Québec was also against Bill C-32 saying that it would clog the courtrooms. Is that really what we want to do in order to save $40 million in annual revenue that should be going to the artists? In addition to short-changing artists of $40 million annually, do we want everyone to end up in court to solve our problems? Would it not be better to recognize that our culture is vibrant and our artists are creative, and say that we will pay what that's worth? I understand that you don't have enough money, but perhaps you should turn to other sectors, look at other budget items, rather than impoverish artists, a segment of the society whose annual income is $23,000 per year on average. That's not quite fair, in my opinion.

Incidentally, when I look at what is happening in Quebec with all the protest against Bill C-32 and fair dealing compared to what is happening in the rest of Canada, let me say it again—I have already said this here—that is another good reason to convince Quebeckers to work towards Quebec's sovereignty.

[*English*]

The Chair: Okay, *merci.*

Mr. Angus.

Mr. Charlie Angus: Thank you.

If our country breaks up, Madame Owen, I'm going to hold you personally responsible, because the Bloc are leaving, and they can't wait to go, but I'm sure many others would disagree with them.

I'm concerned as we move forward with copyright that we're creating a two-tier set of rights here, one in the paper world and one in the digital world, one in the analog world and one in the digital world. I want to look at the situation with the libraries and what really happens on the ground.

I'm looking at the changes to subsections 30.2(4) and 30.2(5):

> (4) A library, archive or museum may provide the person for whom a copy is made...only on the condition that
>
> (a) the person is provided with a single copy of the work; and
>
> (b) the library...or museum informs the person [it is only to be used] for research or private study....

That seems fairly straightforward. I go and I want to take something out. You make me one photocopy of the work. You tell me I can't go make 20 copies and give them to all my friends. That's fairly straightforward.

Yet the next section, regarding interlibrary loans, subsection 30.2 (5.02), says that:

> (5.02) A library...or museum...may...provide a copy in digital form to a person who has requested it through another library...if the...library takes measures to prevent the person...from
>
> (a) making [a] reproduction [in digital form];
>
> (b) communicating that digital copy to any other person; and
>
> (c) using the digital copy for more than five business days

I have two questions here. One is, does "taking measures" mean you're not allowed to do any digital interlibrary loans without the technical protection measures that will not allow anybody to make a secondary copy? And would the libraries across Canada have the means to take some student's master's thesis from 1983 and put a digital lock on it? Is that how you read "taking measures"?

Ms. Victoria Owen: Thank you for the question.

I read "taking measures", with regard to interlibrary loans, as there being a technological measure that would deliver it. I think in some university libraries, the libraries that I know of, for example, we receive the copy of the interlibrary loan electronically, we print it, and the print is given to the person who made the request. That's an interlibrary loan or document delivery. It would be electronic.

● (1245)

Mr. Charlie Angus: You would print it. You wouldn't give him the electronic form.

Ms. Victoria Owen: At the present time we don't. I think those kinds of software may be available at present. We take the delivery from the interlibrary loan or the document delivery, and we make a print copy and distribute that to the requester.

Mr. Charlie Angus: Mr. Rahn.

Mr. Jay Rahn: In the university setting, I can tell you that just this week I've been trying to negotiate a deal that involves UCLA and the Royal Court of Thailand concerning what existed originally on paper in microfilm. Short of my going at my own expense or maybe SSHRC's expense over to Thailand to talk to those people personally, it would be really valuable, and in fact that's what UCLA suggested. We're busy making digital copies of archival materials of that sort for people like you who are doing that kind of research. We just haven't managed to arrange an agreement with Thailand on that.

I can tell you that just last week I looked up a master's thesis on Thai music and a dissertation from the University of York—not York University—in the U.K. At first I couldn't find it anywhere. My interlibrary loan librarian at York said "We found the website where you can get it. Take a look." I downloaded it entirely for free. I identified myself as a university researcher. It was accessible in a digital copy. There was no notice that I had to destroy it or any copies of it within five days.

Even with regard to using the old print technology and making only a single copy, I can tell you that if you do editorial work or you work with databases or concordances—and we mentioned that in our written brief—you never make a single copy. That first copy is so marked up, you're making 10 or 20 copies and putting them all together. They're paper copies, mind you. And you're not doing them all in manuscript, because that would be very inefficient.

Mr. Charlie Angus: I guess, again, it's a question of whether or not we're trying to interfere too much by thinking of every possible way that copyrights could be undermined. I'm looking at having it for five business days and then, poof, having to destroy it.

I have a confession to make, Mr. Rahn. I did get on an interlibrary loan a York University master's thesis from 1986. It took two weeks to come, and then I made a copy. I still have that copy. Then I gave that copy to my daughter. So if you want $5 for it for the library, I'll give it to you. But it seemed to me crazy that if I was researching a book or doing some kind of work, the clock started ticking the second it went from library to library. What possible benefit could there be when we are moving all our libraries into the world of digital to say you can't access this for more than five days? Are you concerned that the incredible potential for research that's out there is going to be impacted if we have a provision like this proposed paragraph 30.2(5.02)(c)?

Ms. Victoria Owen: I agree. I think it misunderstands the research process and the ability to have access to the material long after the delivery of the material. Also, when you look at the tools scholars use to cite their research, they use the citation for electronic references for all manner of use and citation use for the work. So I think it does misunderstand the research process and how scholars and people who do research interact with the material they're studying. It doesn't happen over the extension of five days.

Mr. Jay Rahn: I would add, in this regard, that internationally, Canada can't afford to be the caboose in the train of development of digital technologies. We're very, very far behind. I've cited the case of the U.K., and there are several other parallel ones that could be cited as well. We would be building in more and more restrictions, whereas other folks are opening up their materials that have been largely....

Apart from textbooks, almost all the research is done by university professors and graduate students as part of, say, partial requirements for their degrees or as part of their salaried work. They don't make a great amount of money. If you've ever published with the University Press in Canada, you know that the going rate is 10% beyond cost, and the cost has already been subsidized. You're getting only a tiny fraction. I did one a few years ago that was published by two collaborators. The two of us each got 5%.

So the $23,000 being cited there is not really the central figure. The large dollar amounts are going to publishers or bureaucracies that are created around collective licensing agencies and....

● (1250)

Mr. Charlie Angus: But on this issue of the $23,000, my question is whether in this desire to go after the isoHunts and the peer-to-peer traffickers we're actually going after university research and saying that if we allow that student to keep that case note for more than five days, we're going to destroy our entire creative empire. It seems to me that this is a load of hokum. But it could also create a lot of problems, because people are going to make copies anyway, because they're going to actually need to have copies to defend their theses. A person can't say, "Well, professor, I did have it, but I had to give it back after five days."

Could we not streamline this process a little more to ensure that the intent of limiting copying and the protection of copyright remains in place, while this needless intervention in the real world is just taken out?

Ms. Victoria Owen: I agree. I think the five-day timeline is an unnecessary encumbrance. I think that if people make copies, and they're infringing us, that's the remedy: they're infringing.

The Chair: Okay, thank you very much.

We'll now move to Mr. Lake.

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

Thank you to the witnesses for coming today.

I want to start with fair dealing for education. I have a really basic question. You're all in favour of fair dealing for education, I think. Why is it so important? Maybe you could, in explaining that, provide some examples of how you see it being used.

Mr. Jay Rahn: I would say that the primary importance is not financial, as seems to have been stressed in earlier sessions, and even in this session. That question, certainly in my world, is of relatively little consequence.

What I see all the time are students, and also librarians, to a certain extent, and faculty members suffering from copyright chill when they are in fact already doing research, private study, criticism, and review. They're scared to death of the copyright police, who might be out there. They over-interpret.

I can tell you that currently, at York University, I've been working for a year now on getting rid of all sorts of semi-official language in guidelines for students about academic integrity that conflate, say, plagiarism, on the one hand, with copyright infringement on the other hand, when the two really need to have a bright line between them. Merely putting that word in as an illustrative example of what fair dealing is I think would clarify it for those people enormously.

I can't give you any figures on this, because the phenomenon necessarily involves self-censorship up to this point. People are not going to tell you that, yes, they've been making these copies that may be dubious or are in a grey area. But self-censorship is certainly against the article 2 freedom of expression encouragement we would hope would be manifested in copyright legislation.

Mr. Mike Lake: Go ahead, Ms. Owen.

Ms. Victoria Owen: It's in public libraries across the country where people spend a lot of time in pursuit of lifelong learning. The library community I think understands those uses and that a limited number of copies may be made to support that search for people so that they can continue their education long after their association with an educational institution. Limited copies for their own use, for their lifelong learning, are allowed under fair dealing.

[*Translation*]

Mr. Arash Mohtashami-Maali: We feel that the concept of fair dealing has led to a disagreement within the artistic and literary communities. We also feel that we should perhaps take time to clarify this concept so that the disagreement between the institutions, organizations and individuals is settled while we are studying the legislation, not later in court.

[*English*]

Mr. Mike Lake: I found Madame Lavallée's wording or example interesting as it related to fair dealing. The translation was if she wanted to visit your house, she would ask to do so. The same thing applies to creators. I found that to be an interesting statement.

Mr. Rahn, you talked about copyright chill. And I'm trying to think about education-type situations. My wife is a teacher. I remember being in university, and I imagine the experience is a little different today from what it was then. A subject may be brought up in the class, a discussion may ensue, and someone might want to go on the Internet and look up something, or on YouTube to show something. But without fair dealing for education, I would imagine that chill would be very real. It would really impinge on the ability of the teacher, the professor, the educator to go with the flow as it relates to the classroom.

At the same time, on the other side, I do understand the concern of creators. And I think each of you would say that you work in fields where creation is critically important to your ability to function.

Ms. Owen, you talked about the Supreme Court's two-step test and the six criteria to determine fairness. Maybe elaborate a little more on that to give some assurance to folks who might be on the other side in the creative community, that having a free-flowing education system through fair dealing for education won't result in massive losses in revenue for them.

● (1255)

Ms. Victoria Owen: I think the guidance the Supreme Court gave us in the CCH case, for example, with the six tests that were part of a fair dealing analysis for us. We look at the provision for research and private study. One would ask those six questions when doing a fair dealing analysis. What is the impact of the dealing? How much is it? What are the alternatives to the dealing? Go through all six factors. When you go through all six factors and you end up with “no, this is fair”, you have exhausted any number of other avenues.

You look at, for example, the alternatives to the dealing when the alternative to the dealing is that you can buy a book for $4.95, or whatever the price of the book is. You have to go through each step of that analysis, and do it properly, so you can come up with something that is fair, that fits under the fair dealing analysis.

By following those six steps that were laid out for us, I think you would end up with a very small, specified exception to whatever it is for research and private study, which is the one we conduct most frequently.

Mr. Mike Lake: And of course one of the criteria is the effect on the market for the work. So it would stand to reason that if a significant loss of revenue would result from this fair dealing, that would not be considered fair dealing in the first place.

Ms. Victoria Owen: I think it is the parliamentary prerogative to set the parameters for whatever exception it is, so it complies with not interfering with the economic rights of the creator.

Mr. Mike Lake: Mr. Rahn, do you want to add anything?

Mr. Jay Rahn: Yes, I think the alternatives are very important. In the context where I teach—I teach tutorials, some with small groups, seminars, whatever—I don't have a complete reading list at the beginning of one of those courses that can be turned into a course pack and sold at the bookstore. I have a core bunch of reading for any particular course, but I will have to respond to students' special interests, aptitudes, and questions that come up. There is no time from week to week for me to seek a transactional, one-time-only licence from an author or from a rights holder. There is no alternative.

Should I be barred from using, say, six pages from a book that costs $80, or wait until the next year and force all the students to buy the $80 book for that six pages? It just bears no relationship to the actual on-the-ground experience of university faculty.

Mr. Mike Lake: I'll stick with you, Mr. Rahn. You may have raised some heart rates on the opposition side by throwing in the recommendation that the phrase “such as” be added to fair dealing. Maybe you could elaborate on this. What would be the benefit of that, in your view?

Mr. Jay Rahn: It would make us consistent with the United States, which has had “such as” in its copyright act for quite a while. In fact, with regard to education, it puts in parentheses, “including multiple copies for classroom use”, which is far beyond what any of the group here are recommending.

By the same token, and in response to Madam Lavallée's comments, one cannot say that artists have disappeared from the U.S. in the meantime. The publishing industry is going great guns down there, and a large part of the textbook industry in Canada consists of Canadianizing—at students' request and demand—materials from the United States. So I don't think we run any great risk of impoverishing our artists, creators, or publishers.

The Chair: Thank you very much to our witnesses.

That brings this meeting to an end.

The meeting is adjourned.

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