House of Commons
CANADA

Standing Committee on Canadian Heritage

CHPC • NUMBER 008 • 3rd SESSION • 40th PARLIAMENT

EVIDENCE

Tuesday, April 20, 2010

Chair

Mr. Gary Schellenberger

Standing Committee on Canadian Heritage

Tuesday, April 20, 2010

● (1115)

[*English*]

Ms. Roanie Levy (General Counsel and Director, Policy and External Affairs, Access Copyright): I will start. Following me will be Danièle Simpson, and then Glenn Rollans, followed by Marie-Louise Nadeau, and then André Cornellier. We will try to keep it at 10 minutes or less.

Good morning. Thank you for the opportunity to appear before the committee.

My name is Roanie Levy. I am general counsel and director of policy and external affairs at Access Copyright.

Access Copyright is a not-for-profit organization established in 1988 by publishers and creators—authors. We have a dual objective. The first is to facilitate dissemination, access to and use of published works and our Canadian cultural heritage by the public, including the education sector. The second objective is to ensure that authors and publishers are reasonably compensated so they can continue this vital role.

[*Translation*]

Many people have testified about the opportunities and challenges presented by digital media. Notions such as business models, technology, industrial financing, new players, access, interoperability, jurisdiction and others have given rise to much discussion and will continue to do so.

Although the focus of these meetings was not copyright as such, virtually every meeting has mentioned the Copyright Act and the need for amendments to it, perhaps to the despair of committee members.

One fact concerning copyright seems to be emerging. Some witnesses have come back to the subject a number of times. And that is fair dealing. For the most part, you have heard witnesses come before you and ask for a simple and cumulative change to the fair dealing provisions. You have heard that the addition of a single word, such as “notamment” in French, or of two words, “such as”, in English, would resolve the matter of the access needs of consumers and users of copyright-protected works.

Today you will hear that not only is this proposed amendment not simple and will not resolve the problem of access needs of consumers and users but, what is more, that such a change would have a considerable impact on the ability of creators and copyright holders to monetize the use of their works.

[*English*]

Adding the words “such as” can be so detrimental to existing and future business models that over 50 Canadian organizations, representing hundreds of thousands of artists, choreographers, composers, directors, educators, illustrators, journalists, musicians, performers, photographers, playwrights, producers, publishers, songwriters, videographers, and writers from across the country, joined forces to submit a paper during the copyright consultations, warning against expanding the fair dealing list.

These hundreds of thousands of creative Canadians are asking this government to provide a secure legal environment that allows them to continue to earn a return on their work without fear of spending their time, energy, and the return they do earn, on litigation.

First, I will provide a brief explanation of how fair dealing works in Canada. The permitted purposes under Canada's fair dealing provisions allow dealing with a work when the purpose is for research or private study, *étude privée ou recherche*; criticism or review, *critique et compte rendu*; or news reporting, *communication des nouvelles*. A user can make a copy of work without permission or payment for one of these purposes, provided the dealing is also fair.

Adding the words “such as” to the current fair dealing purposes turns the list from an exhaustive list of five purposes to an illustrative list. This is a significant change to Canada's current fair dealing provisions. It is not simple, nor is it incremental, as some proponents of an open fair dealing provision contend.

Let me explain why. Adding the words “such as” creates a lose-lose situation for everybody, creators and users alike, since everything becomes uncertain and is subject to expensive litigation. That's because an open-ended fair dealing provision—or “fair use”, as it is called in the U.S.—puts into the hands of the courts what should be determined by Parliament.

Let us take a moment to consider how this constant moulding of the fair dealing exception by the courts would happen. The courts would essentially determine whether a particular use is fair as a result of a conflict between two private parties. With the evidence that is needed to resolve that particular individual and private conflict, the courts would set or reset where copyright ends and fair dealing begins.

Moreover, in the context of private litigation, the courts would never be able to make decisions that take into account the political issues involving major public policy considerations or public policy issues with economic, social, political, tax, employment, and cultural implications, as well as implications affecting investment and innovation and the preservation or promotion of specific cultural values throughout the country, including Quebec, among aboriginal people, and in Atlantic Canada.

So not only is the setting of the boundaries between copyright and fair dealing an abdication of political decision-making, with huge implications for a multicultural country like Canada, but the courts do not have the capacity to do it justice.

This is not just speculation about what would happen. We are already living with the uncertainty created when court decisions based on a particular set of facts are applied by users to a different set of facts. For example, the decision by the Supreme Court of Canada in CCH, a decision that others have mentioned to you, has significantly increased the difficulty faced by Access Copyright to negotiate licences for the photocopying of works in all industries.

The right of publishers and creators to collect, for example, $20 million a year for the copying of their works in the elementary and secondary sector is in jeopardy. The ministries of education are arguing that as a result of the Supreme Court of Canada decision in CCH—that involved lawyers—the 265 million pages a year of published works that are photocopied by teachers is fair dealing.

This $20 million was the value set by the Copyright Board, which is an expert tribunal, as a fair and reasonable rate to pay after it analyzed extensive evidence on the use and value of the works photocopied by teachers in elementary and secondary schools. Often these uses are a substitute to purchasing books. This value also factored in an allowance for fair dealing.

The educational publishing sector relies on these revenues to sustain its investment in Canada. This is a sector where Canadians have unique and important needs across the country, and the capital investment required to serve those needs is large. Nevertheless, the outcome of the $20 million a year is in the hands of the courts.

● (1120)

Expanding fair dealing by adding “such as” or adding extensive new purposes will significantly exacerbate what is already a very difficult situation for creators. It would change from five permitted purposes to all uses of works, or extensive new uses, being subject to a court's interpretation of fairness.

So what some are calling flexibility is, in practice, a liability for both creators and users of copyright. An open-ended fair dealing provision leaves copyright owners and users guessing where copyright ends and fair dealing begins.

This is why Lawrence Lessig, a well-known advocate of free culture, says that fair use, which has an open-ended list of purposes, amounts to little more than “the right to hire a lawyer”. David Nimmer, a well-known copyright scholar, also calls fair use a “fairy tale”, whose complexities have required four separate visits to the U. S. Supreme Court, and yet have resulted in a system whose “upshot would be the same...had Congress instituted a dartboard rather than the particular four fair use factors embodied in the Copyright Act...”. Nimmer was referring to the illustrative list in the U.S. Copyright Act.

The truth is that this level of uncertainty is not good for anyone. The full impact of an open-ended fair dealing provision may be difficult to predict, but the fact there will be unintended consequences is wholly predictable.

Adding the words “such as”, or adding to the list of purposes things like education, teaching, or private use, would significantly undermine existing and future business models. It has the potential to impede on collective administration of copyrights, which is of growing importance in a digital environment. Collective administration can be relied on to meet the needs of users by providing easy and affordable access to works, with the certainty they are not infringing copyrights, and to at the same time compensate rights holders for their creative efforts and investments. Expanding fair dealing would also negatively impact the private copying regime and cause confusion in existing contracts between creators, rights holders, and users.

Faced with similar pressures by users to expand fair dealing, almost every country or jurisdiction that has considered an open-ended fair use model has rejected or not adopted it, including, recently, Australia, the United Kingdom, New Zealand, and the European Union. They rejected it for the reasons I've just described, but I would like to read for you one of the reasons given by the U.K. government when it rejected the idea of moving to a fair use model in 1981: “In view of the difficulties already experienced by copyright owners in protecting their rights, the Government does not feel it would be justified in making an amendment which might result in further encroachments into the basic copyright”.

I think you will agree with me that to say copyright owners are experiencing difficulties in protecting their rights today is an understatement in today's digital environment. The statement made in 1981 that I cited above is truer today than it ever was, so it is not surprising that the U.K. government rejected the notion again when it revisited the issue, this time in 2008. Canada should do the same.

Thank you.

● (1125)

The Chair (Mr. Gary Schellenberger (Perth—Wellington, CPC)): Thank you for that.

Our next presenter is Danièle, please.

[*Translation*]

Ms. Danièle Simpson (President, Vice-President, Union des écrivaines et écrivains Québécois, Société québécoise de gestion collective des droits de reproduction): Good morning. My name is Danièle Simpson. I am president of Copibec and vice-president of the Union des écrivaines et écrivains du Québec. I would like to thank you for this opportunity to present the views of those two associations on the impact of digital development on the book industry.

The Union des écrivaines et écrivains du Québec, UNEQ, has been in existence for 33 years and was recognized in 1990 as the association most representative of literary artists in Quebec under the Act respecting the professional status of artists in the visual arts, arts and crafts and literature, and their contracts with promoters.

Copibec, the Société québécoise de gestion collective des droits de reproduction des oeuvres littéraires, was created in 1997 by UNEQ and by the Association nationale des éditeurs de livres. It represents more than 850 Quebec publishers and 17,000 authors of books, newspapers and periodicals, including visual artists who publish in them. It also represents the authors and publishers of some 20 countries through bilateral agreements with foreign management companies. Copibec annually redistributes nearly $13 million to rights holders.

The current concern of players in the print world, whether they be authors or publishers, is the reduction, through the expanding notion of fair dealing and the adoption of new exemptions, of the incomes they need to pursue their creative activities, on the one hand, and their distribution activities, on the other. There appears to be some confusion in user's requests between what is accessible and what is free, as though the only way to ensure that those works are accessible is to make access to them free of charge.

This confusion, if adopted by legislators, would have dramatic consequences for the book industry. Imagine, for example, that the reproductions of works in the education industry were considered a matter of fair dealing. That would result in a loss of $9 million for authors and publishers, and place Copibec in a precarious situation as royalties from the education sector represent 70% of its revenue. We would thus run the risk of having no company in Quebec whose primary responsibility is to protect the right of authors and publishers of literary works. As a result, authors and publishers would have to take charge of the matter personally, with the financial burden that would entail.

In its last survey conducted in 2004, the Observatoire de la culture et des communications du Québec showed that [part missing] creative activity was the main source of income for only 9% of writers and that 60% were required to carry on a second occupation to support themselves. In those conditions, how could we justify depriving them of more income?

As for publishers, you must understand that the production costs of a textbook and teacher's guide can reach $1 million. Expanding the notion of fair dealing would risk not only invalidating current agreements that Copibec has signed with the Department of Education, but would also considerably undermine the publishing industry in Quebec, which only has access to a small market, but whose existence is essential to the survival of its culture. It would also hurt all workers in this industry.

Now let us consider the situation, again in education, of these reproduction costs for the Ministère de l'Éducation, des Loisirs et du Sport and for postsecondary institutions. Out of a total budget of $14 billion, the department of education pays $3 million for primary and secondary schools to compensate them for the use of $68 million copies of books, newspaper articles and artistic reviews or works, that is less than $3 per student. Add to that $70,000 for the performance of dramatic works in the schools and $600,000 for the reproduction of musical works, and you get a total of less than 0.0003% of the department's budget. For the colleges, the rate is $10 per full-time student for 21 million copies, and for the universities, $23.50 per student for 86 million copies. As you can see, there is a lot of reproduction of works in education. It represents more than 175 million copies a year, the equivalent of 875,000 200-page books. However, the cost represented by the fair compensation of rights holders is very small.

● (1130)

Once again, in these conditions, how can we justify depriving authors and publishers of necessary income?

The Copyright Act has established a satisfactory balance between the rights of creators and those of users. Switching from the fair dealing model to the fair use model, as some are requesting, would introduce into Canadian law a foreign concept that has far from unanimous support in its country of origin, whereas there are methods in Canada that reflect the values of Canadians. This would cause confusion and uncertainty that would undermine the energies of creators and users alike.

The present Copyright Act is currently designed to protect the public interest by ensuring access to works. Its goal is not to satisfy the personal needs of users that do not wish to pay for the content they are seeking, whereas they do not hesitate to pay for the cost of digital media. It is this spirit of the act that must be retained, particularly since there is no problem of access to works.

The management societies adequately play their role as a single window providing access to a broad range of national and foreign works and exempting uses, by signing a comprehensive licence, from having to request permission from every rights holder to use that person's work. Nor is there any surprise regarding rates since they are negotiated with users in advance. Furthermore, nearly all revenues are then paid to rights holders both here and outside Canada.

The management companies are thus entirely able to deal with the technological changes, but what is particularly true is that there is no justification for making access free of charge exclusively for users by unfairly expropriating from authors the revenues to which their work entitles them.

[*English*]

The Chair: Thank you.

Now we will go to Glenn, please.

Mr. Glenn Rollans (Partner, Lone Pine Publishing): Thanks very much.

I'm probably the one you're going to have to shut up, because I'm not reading from a prepared statement. I'll try to stay within the time limit.

I really appreciate the chance to talk with the committee today. I've been a working writer and publisher for about 30 years. I'm a partner in Lone Pine Publishing, a company from Edmonton that works across Canada and the United States. We're a member of the Book Publishers Association of Alberta and of the Association of Canadian Publishers. Both of those associations are among the groups that Roanie mentioned as signatories to the document concerning issues around fair dealing.

But I recognize that today we're talking principally about opportunities and issues in the digital environment. I wanted to mention that my background includes recently being a partner in Les Éditions Duval, an Alberta-based educational publisher in the K to 12 sector, and also a former director of the University of Alberta Press. So I have a fair scope in terms of academic issues in publishing, educational issues, and issues in what we call “the book trade”, which is the bookstore world of book publishing.

And in digital issues, education is well ahead of the trade. Perhaps 20% to 30% of that sector is now in a digital format. As early as 1995, Les Éditions Duval did three levels of Cree language education as interactive digital resources. In contrast, Lone Pine, at this stage, has more than 300 titles of its list of about 800 titles in e-pub forms, but we haven't released any of those editions into the digital marketplace.

That's not because there aren't opportunities there. I see the digital world as having some really spectacular opportunities. I think in education we've seen that resources can be not just more portable but more effective. They can have more functionality built into them. They can potentially be more beautiful. I think design in digital environments is coming along.

The questions around whether they can actually support professional producers are unresolved. For Lone Pine at this stage, the reason we have 300 or 400 works in digital form but haven't released them is that the rules of that marketplace are, I think, significantly underbaked at this stage.

If Canada is going to be a leader in the digital economy, in my mind we have to be a leader in copyright protection for producers of original resources. That includes writers and visual artists, and publishers, who have a creative role in the creation of resources. Where people hold copyright and are secure about the rules in the marketplace, I think they're going to be very energetic participants.

In the book trade, we're only about a 1% to 5% digital economy at this stage, and that's different from sector to sector. In scientific, legal, technical, and medical publishing, it's a much higher percentage than it is in the book trade. Even in the trade in general, there are hot spots. Romance, for example, is a hot spot for digital resources, and office workers tend to download them at lunchtime. You can see these incredible spikes in the download rates for some publishers at lunchtime. There are matches for certain kinds of reading.

In the trade in general, my sense is that publishers are going to participate more confidently in digital business if they're adequately protected. That means having some expectation of reasonable compensation and also some expectation that, when they let the cow out of the barn in digital form, it is going to both improve access and improve, in a sense, their business possibilities. The business that a publisher does flows through to its writers, designers, editors, salespeople, and retailers. It has huge spinoffs and it's important to protect those, in my mind.

I do want to talk specifically about fair dealing, so I'll come to the end of my presentation and just mention our view on the role of collectives as well. I think collectives like Access Copyright or COPIBEC have a huge role in this economy.

Lone Pine has huge opportunities because we are a natural history publisher and a gardening publisher. We have huge opportunities in the digital world to disaggregate content and repackage it as applications or small downloads for users. This is a really common opportunity in education as well.

In an expanded fair dealing environment, the expectation of users that small uses will be uncompensated I think goes way up; this is what we've seen in some of the test cases in the United States, for example, under their fair use environment.

● (1135)

As publishers, we're often charged with not entering whole-heartedly into digital business models or not creating them. Those models exist, but they're not functioning very well, and they won't function well until there is confidence in the publishing world in entering that market. They'll function for people who are creating works as part of their ordinary employment as an instructor or professor, but they won't function for people whose profession is writer, illustrator, photographer, or publisher.

If you expect a business model that runs on micro-tariffs, then micro-uses have to be compensable. They have to be paid for. If they're not, and if a higher proportion of uses are small uses, the undercutting of the revenue base for people who make their living in this world is going to be pretty extreme. and many of us won't be able to make a living.

I think that in the fair dealing and expanded fair dealing environment we're going to see some sectors test the limits of fair dealing very strategically and with a cost-benefit approach to it. Large educational systems. like the provincial ministries, and large educational institutions have already shown that they are very interested in this issue. I see it as ironic, because for the knowledge and information they want to access and that creators want them to access, it's a two-way street. There's no satisfaction in being a writer or a publisher if you don't have people using your material.

But if we enter that world and are dealing with primary customers who are showing an interest in having a larger and larger proportion of their content delivered for free, the irony is that the very knowledge they're seeking—when it comes to a transaction in money terms—is the thing they put the least value on. They're paying for ISPs, which are huge players in this economy. They're paying for professionals, for information professionals and libraries and so on. They're paying for the devices they use: the projectors in classrooms, the hand-helds, and the computers.

Everything in the system is paid for up to the point to where what is a relatively modest expenditure—the expenditure, as Danièle mentioned, on educational content—is where they draw the line, where they don't want to pay.

As a parent with three students in university, I can sympathize with the expense issue. It's very expensive when you think in terms of dollars spent. In value terms, I think of the value received. In grade schools, we're spending annually across Canada only about $50 per student on educational resources. In universities, where it approaches $1,000 per year as a proportion of the educational budget, the value that's returned is enormous. I think the value equation has to be kept in mind as well as expense.

I think Roanie mentioned that expense can be a bit of a canard in this discussion, because when you talk about millions—and Danièle mentioned this as well—millions are big numbers, but when they're matched against billions that are spent, are they too big a number? When they're spread across the community of creators and publishers in Canada, I think the record is that those are underpaid professions, and the issue starts with how much we're spending on those things.

So we do see a very strong association—or I see it personally—between advocates for expanded fair dealing or for increasing the number of exceptions in the Copyright Act. For example, an educational exception would completely undercut the educational publishing world. That prospect is one of the reasons that I'm not an educational publisher anymore.

But we see a connection between that and concern about collectives, so I want to emphasize just in passing at the end of this that when I hear about Access Copyright or COPIBEC from the outside, I hear about them as monolithic institutions, agencies that are bullying the system. They're very small in comparison to the system and they are true collectives. They're places where we come together, so that when it comes to litigation, which is a terrifying prospect for me under an expanded fair dealing environment, we have a chance to pool our resources, and when it comes to licensing, we have a chance to pool our resources and bring some order to a system that needs order.

Expanded fair dealing is a place where the rules will be very unclear. I think the relationship of mutual interests between users of copyright and creators of copyright really demands good fences. Good fences make good neighbours. What I'm looking for in what comes down in terms of the new copyright is those good fences: clarity definition, not open-ended definition.

● (1140)

Thank you very much.

The Chair: Thank you. That was right on 10 minutes. That's very good.

Now we'll go to Marie-Louise, please.

[*Translation*]

Ms. Marie-Louise Nadeau (Director, Playright, Société québécoise des auteurs dramatiques): Good morning.

The Société québécoise des auteurs dramatiques was founded in order to manage a financial agreement entered into by the Ministère de l'Éducation, des Loisirs et du Sport, MELS, previously the MEQ, on copyright payments owed for theatre plays performed by students in Quebec schools. That agreement, in addition to enabling SOCAN to pay royalties mainly to authors from Quebec, but also from Canada and other countries, sets out guidelines for the use of dramatic stage works and their transmission in any medium whatever.

We have the management authorizations of 250 Quebec and Canadian playwrights for, among other things, school performance rights, reprography rights and telecommunications and digital rights. We also have a management agreement with COPIBEC for copies of theatre plays for study purposes and of theatre plays for study and rehearsal purposes in both paper and digital formats.

Before we signed our agreements with MELS, that is prior to 1994, and with COPIBEC during the 2000s, there were simply few or no royalties for dramatic authors in the education sector. Currently, however, the application of fair dealing exemptions, including under section 29.5 of the Copyright Act, deprived dramatic authors of plays staged in Quebec schools of 55% of their potential income.

Between the 2006 and 2009 school years, 887 of 1,950 performances in Quebec schools, or 45%, owed copyright royalties. That's a lot when you know that a playwright in Quebec earns an average of $5,000 in copyright royalties a year. It's clear to us—and the figures speak for themselves—that playwrights are already contributing a lot to fair dealing. We are convinced that expanding fair dealing, in addition to causing confusion among some users already confused about existing exemptions, would be dramatic—pardon the pun—for authors and our small organization dedicated to defending their rights.

We do not have the financial or human resources necessary to prove, on a case-by-case basis, that such and such an organization erred or misinterpreted fair dealing. In the area of digital rights, we currently authorize users to record performances for archival purposes. We authorize, on request, the distribution of excerpts of two or three minutes on the Internet, provided the user undertakes to respect the work distributed.

But how to retain current control over the transmission of dramatic works via the Internet if fair dealing is further expanded? How can we justify to playwrights a decline in their rights that results in a further loss of income and control over the distribution of their works, both on stage and via the Internet? Don't make cuts to what has been acquired over the years. The system works well. It's a matter of survival for us and respect for the works of playwrights.

Thank you.

● (1145)

[*English*]

The Chair: Thank you very much.

We'll move to André, please.

Mr. André Cornellier (Co-Chair, Chief Executive Officer of La Maison de l'image et de la photographie, Canadian Photographers Coalition): My name is André Cornellier. I'm an artist and a photographer. I'm also a director of UMA, La Maison de l'image et de la photographie, and I represent the Canadian Photographers Coalition, which represents 14,000 workers in the photography industry.

Thank you to the distinguished members of the committee for hearing us today.

You are asking about what is affecting our industry in the digital age and what you can do to help us. I will talk about one thing you could do to help us and one thing you should not do.

[*Translation*]

First, let's talk about how you can help us. Photographers from here do not have the same rights as other Canadian artists or other photographers in industrialized countries. Subsection 10(2) of Canada's Copyright Act provides that copyright belongs to the person who owns the negative. There is no negative in the digital age. Furthermore, why would copyright belong to the person who buys the film rather than the artist who created the work? Is copyright given to the person who supplies the guitar or the artist who composes the work?

The present government introduced an amendment, in the spring of 2008, in Bill C-61, which repealed subsections 10(2) and 13(2) and restored copyright to the photographer. We would like the present Conservative government to make the same amendment in the next bill, particularly since the Liberals also proposed that amendment in 2005 in Bill C-60.

Now let's talk about what the government should not do. The government should ensure that the Internet is accessible to everyone everywhere. It should ensure that the information highway is accessible everywhere at an affordable cost. That will assist in the development of commerce and Canadian culture. At the same time, it must resist the idea of making content free of charge. When the government builds roads and highways for goods and services to be accessible everywhere, what is transported on them is not free of charge. Making something available does not mean making it free of charge. It means that what is not available in a region is now available there and that people can now buy it.

What is the interest in building a refrigerator if it becomes free of charge because you transport it on a highway? Does selling shoes rather than giving them away undermine the shoe business? Does that make it so no other companies create new shoes?

The same is true for the Internet. Creating the information highway does not mean that what is transported on it must be free of charge. The right to own and enjoy one's inventions and creations is a fundamental right for a fair business. This actually encourages creation. Is the claim being made that you encourage creation by making everything free of charge? Where then is the encouragement?

When we advocate compliance with copyright, we're told that we are undermining creation, that we understand nothing, that we should deal with the new ideas and new needs of the digital revolution. A seminar was held in Toronto on April 29 and 30, 2008. It was attended by all segments of Canadian culture, representing all opinions on copyright. More than 140,000 creators in all fields were represented there: music, visual arts, performing arts, writing, film and video. There were also promoters of a free Internet, those who are opposed to copyright. There were the promoters of the Creative Commons. There was Mr. Geist, there were “appropriationist” artists and a number of representatives of the next generation, the young generations. All ideas and all ages were represented there.

One young artist, in his twenties, made a presentation on one of his creations. It was a three-minute video. He had taken hundreds of images off the Internet and had assembled them in layers. His creations consisted of numerous recombined images. The video images were collages. Hundreds of collages one after the other composed a symphony of highly coloured images. He explained that, if he had had to request copyright permission for each of those images, it would have taken him months and cost tens of thousands of dollars. He therefore asked that copyright be abolished on the Internet and that an exemption be introduced so that he exempt from copyright since it was holding back his creativity.

We told him about a hypothetical case. If a company, such as Ubisoft, for example, created a new electronic game and, liking his pictures, decided to take them off the Internet and include them in their software, to use them to package a product or whatever else, that shouldn't be a problem for him. He answered without hesitation that he would sue them.

On January 30 last, I was in the offices of a young design firm in Montreal. During a conversation, the two designers, knowing that I worked for the recognition of copyright, told me that I didn't understand the needs of their generation. One of them told me he was making music and that they preferred to distribute their music on the Internet so that people could download it free of charge so that they could make themselves known. As a result of that, the old models that I supported were no longer valid. There should be no more copyright.

● (1150)

I asked him if there would be a problem if a group in Canada or the United States liked their music and wanted to record it and distribute it on a CD and over the Internet. He answered without hesitation that he would sue them.

There are hundreds of examples of this kind. They all say they don't want copyright so as not to inhibit their creativity or the distribution of their creations, but they all want to sue those who appropriate their works. How could they sue if there was no act protecting them?

This doesn't show that they don't want copyright; it shows only one thing: ignorance of copyright. When you carefully listen and try to understand their thinking, you understand that they want to be able to decide when to share their creations free of charge and when to profit from them. The right to decide where, when and how you want to share your creations is called copyright.

Current copyright effectively achieves its mission and protects creators old and new, those of yesterday and those of tomorrow. It enables them to give away their works free of charge or to profit from them and to create new original works. Do not open the door to all these exemptions that are asked of you. The exemptions you create today to allegedly facilitate creation will in future turn against those who requested them and they will not be able to protect their own works. Giving permission to plagiarize encourages plagiarists, not talent. Real artists have never been afraid of any constraints. Respect for rights encourages creation. If you give in today to requess for exemptions, in 20 years, they'll be the first ones to criticize you, and rightly so, for not protecting their creations and their property.

Thank you.

● (1155)

[*English*]

The Chair: Thank you very much.

The first questioner is Mr. Coderre, please.

[*Translation*]

Hon. Denis Coderre (Bourassa, Lib.): Thank you, Mr. Chairman.

First, I must admit I find it abnormal that we can consider, even if for only a moment, not only removing the ability to create, but also not protecting the creator of a work. The very basis of that creation is that person's ability to distribute it; it is revenue. We must not get into a free for all. Personally, I have always wanted to protect the creator above all. That's the very basis of everything.

I have a 17-year-old daughter and a 14-year-old son. So you can see me coming with this generational debate over access. I sense that there is unfortunately a culture that trivializes access. Rights and privileges are confused. It's a privilege to have access to a work. On the other hand, I put myself in the position of consumers. The clearly want greater distribution. Consumers must have access to the creation of a work and become a kind of standard-bearer for it. That's what we're talking about in terms of balance.

I have no problem with the issue of power relationships or with the possibility that we can give you the necessary tools to defend yourselves and a certain degree of protection. If you don't have that negotiating ability, you're at the mercy of someone else.

We get the sense that technology is moving much faster than the law. As a result, the law we change today will be moot in a year or two. I remember all the work we've done. You talked about Bill C-60, and it's still the same thing. At the time, we were talking about cassettes and CDs. Now we have iPods and iPads, and ultimately we don't know what will be coming. This is an issue that seems philosophical, but I think is important as a legislator. What is your definition of flexibility?

Ultimately, we need a business model so that you can protect yourselves while giving us decent access to that work for educational or other purposes. But put yourselves in our position.

I'm going to start perhaps with Ms. Levy and Ms. Simpson, since they live from these exemptions. How do you define this flexibility? There is a definite evolution. I want to protect the creator and allow wider distribution. Ms. Levy, perhaps, to start with?

Ms. Roanie Levy: First, I think there's a difference between flexibility and neutrality of the legislation with regard to technology. Those are two completely different things. I think that people often confuse the two and believe that we need flexibility to adapt to everything that might arise and that we can't predict. On the contrary, we perhaps need legislation that is technology neutral.

What we can do is describe the uses that are permitted, rather than have any “flexibility”. Ultimately, that flexibility creates such a vague situation that no one knows where copyright stops and fair dealing begins, for example. Ultimately, it is left up to the courts to decide whether, in future, fair dealing without compensation should be permitted. We're trying to control a future that we don't know by leaving it up to the courts.

That is simply not a solution to the problem. First, it shouldn't be up to the courts to shoulder that responsibility. They don't have the ability to do it. In addition, they wouldn't have the necessary impact studies to assert that a particular use would or would not involve compensation as a result.

I understand the challenge. It is indeed a major challenge. However, the solution is not to grant flexibility that hands the problem over to the courts.

● (1200)

Hon. Denis Coderre: My problem is that—

[*English*]

The Chair: Our questions and answers are for five minutes. We're over five minutes.

You asked a couple of other people to comment, Mr. Coderre. I'm going to allow that a little, and I'll do that for everyone in the first round.

[*Translation*]

Hon. Denis Coderre: I'm talking about flexibility, Ms. Simpson, because, in a way, I believe we have to adapt. An act must also in a way have a living character. Otherwise, we may have to have the same debate every year because technological progress is too fast.

Ms. Danièle Simpson: What Roanie just said is that the act should be technologically neutral. In particular, people have started thinking that flexible is synonymous with free and have skipped stages. From the moment they do that, we're no longer heading in the right direction. Flexibility does not mean that something is free of charge. We should aim for flexibility only in terms of flexibility not in the sense of something being free.

Hon. Denis Coderre: All right.

Ms. Nadeau.

Ms. Marie-Louise Nadeau: The situation is specific to the performing arts. I said that the dissemination of excerpts of theatre plays was already permitted. However, I can tell you that, in our field, we've already defined what that should be. A theatre play is a theatre play and it should be performed on stage. Our problem is that the application of exemptions deprives authors of income; that's clear. We've already addressed that aspect.

For theatre plays, we have agreements with Copibec concerning the paper medium that work very well. That's already in place for us. We're saying that we don't want any expansion because, for the user, for a school teacher, it's already complicated as it is with the current exemptions. We provide a lot of information on this subject on our web site, with specific examples. The Department of Education does it as well. So we're continuing along that path.

Hon. Denis Coderre: We won't touch that.

[*English*]

The Chair: Madam Lavallée, you'll have seven minutes.

[*Translation*]

Mrs. Carole Lavallée (Saint-Bruno—Saint-Hubert, BQ): Ms. Levy, do you know why the Copyright Act is complicated? It's because we don't clearly see the underlying principles or the orientation the current Minister of Canadian Heritage wants to take with his new copyright bill, which we have in front of us and which will be introduced in a few weeks or months.

And yet it's simple for the Bloc québécois. We have three principles. The first is that artists, creators and crafts people must be compensated for their work. In our minds, that's fundamental. Creators must also be able to create rather than sue people who violate their copyright. The second principle is to promote dissemination, in all possible ways, while bearing in mind that music and works of art are not free of charge. Lastly, we must discourage professional pirates and little crooks who consider these works free of charge. If we created a new Copyright Act by taking these three principles into consideration, I believe that creators, artists and crafts people would be well served.

You also talked about fair use and fair dealing. I'm pleased to have the opportunity to talk about them. I find this complicated. I've asked people to explain the difference between those terms to me. I've been told the following: fair dealing corresponds to the Canadian act as we know it. The French translation of that is “utilisation équitable”. The list of exemptions would be closed. Fair use apparently corresponds to the American system as we currently know it. The translation of that is “usage équitable”. The list of exemptions would be open. There is the use of the expression “such as”, which is translated in French as “notamment”. In Canada, some people have said that England, Australia and New Zealand studied it and then rejected it.

I would like to know whether my interpretation of those two definitions and my explanation are correct.

● (1205)

Ms. Roanie Levy: Absolutely. That's precisely the difference between fair dealing in Canada and fair use in the United States.

Mrs. Carole Lavallée: So if I use the terms “fair dealing” and “fair use”, people who know copyright would understand me.

Ms. Roanie Levy: Yes, that should be the case.

Mrs. Carole Lavallée: All right.

Do you have any other comments, Ms. Simpson.

Ms. Danièle Simpson: Yes. When you rely on fair dealing in Canada, there are really very few lawsuits because the exemptions are clear. From the moment they no longer are clear, everything is open to debate.

Mrs. Carole Lavallée: Does that mean that, if we created a system such as the American system, fair use, there would be a lot of lawsuits?

Ms. Danièle Simpson: I can't say that there would be a lot. However, there would be a higher probability of a lot of them.

Mrs. Carole Lavallée: Can you explain that to me?

Ms. Danièle Simpson: I'm going to ask Roanie to do it instead.

Ms. Roanie Levy: I think there would indeed be a lot of lawsuits. Until there have been a lot of lawsuits, we won't absolutely know where copyright ends and fair dealing begins. The only way to determine that would be through the courts. That would be their responsibility. That would take tens of years and it will never be finally resolved.

Mrs. Carole Lavallée: As in the Claude Robinson case.

Ms. Roanie Levy: Indeed.

Ms. Danièle Simpson: In addition, every time, it's an individual case, a specific issue. We haven't created a framework as a law would. One case is added to another, which is reduced by the next one, and so on. You move forward one step at a time, then you move backward.

Mrs. Carole Lavallée: I would like you to give me an example that would help me understand to what extent American-style fair use would not of do artists any favours and would require them to file lawsuits. Give me an example, even if it's a fictitious case. I really want to understand.

Ms. Roanie Levy: I mentioned a situation we are currently experiencing. This is not fair use in the American sense. Our framework is that of Canadian fair dealing. Despite the fact that the dealing list is limited in Canada, the concept of equity must be determined on a case-by-case basis.

We are currently conducting a judicial review of a decision by the Copyright Commission. The aim is to define, on the one hand, what private study is and, on the other hand, the term “fair”. For Canadian authors and publishers, this involves $20 million a year. It's the courts that will determine whether the use is fair with regard to that very large amount of money. This kind of complexity and challenge will increase exponentially when all uses of a work, not just the five enumerated in the Canadian act, are subject to a fair dealing analysis.

Mrs. Carole Lavallée: You didn't give me an example. I would have liked you to cite an example of an artist who created music that is used by I don't know whom. You didn't cite an example.

Ms. Roanie Levy: I'll give you a somewhat more concrete example. For example, in the United States, you may have heard of the Google project to digitize all literary works in the world. They have somewhat limited the agreement they signed, but they want to digitize all literary works. They take the works, they copy them, they digitize them and subsequently make them searchable so that people can find them on the Internet. Google claims that this use—which is an enormous use, as you'll agree with me—is fair in the American fair use sense.

So that will be very far from what people think or could try to put into this fair dealing context.

● (1210)

Mrs. Carole Lavallée: So, if I correctly understood—

[*English*]

The Chair: We're coming to the conclusion of your time.

[*Translation*]

Mrs. Carole Lavallée: Perfect. If I correctly understood, in conclusion—

[*English*]

Is it okay?

The Chair: No. It's concluded.

Mrs. Carole Lavallée: It's over?

The Chair: Yes.

Mr. Angus, please.

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

This is a fascinating discussion. If I have to leave early, it's not out of disrespect. It has been just crazy over the last two weeks, and I'm trying to juggle all the balls in the air.

I might not be, but I do claim to be the one member of Parliament who did try to make a living on copyright, and that's why I had to get a suit and become a politician—

Some hon. members: Oh, oh!

Mr. Charlie Angus: —so I'm very interested in this.

I do receive money, not much, maybe about twelve bucks every three years, for an article I wrote when I was much younger. It's in a textbook. I appreciate that $12. At the same time, I ran a magazine for 12 years and we published a lot of stuff online for free. A lot of schools used it. It was a business model that we were trying to build. So I know both sides.

I saw an amazing article in my local paper the other day by a Cree journalist who had discovered books that had been lost and were basically out of print, books in which early missionaries were writing about the Cree language. Now they're on Google Books. He was totally excited.

I'm interested in the possibility of where we can go with digital culture. I represent a riding where I have many, many isolated communities where people use long-distance education, so I'd like to start off by trying to get a sense of this.

Under the Conservative plan for long-distance education in the last bill, the schools would be under an obligation to destroy the lessons 30 days after marks have gone out. They would have to make all reasonable efforts to basically prevent students from keeping copies of the lessons. Is that fair?

Ms. Roanie Levy: You asked two questions there. The first question is about our digital culture and—

Mr. Charlie Angus: No, I'm actually interested in the second question. Is that a fair position for the federal government to take, to tell students that they're not allowed to keep copies after 30 days if they're taking digital online courses?

Ms. Roanie Levy: When you create an exception where a copyright holder, a user, a rights holder, is not paid for the use of the work, I think you need to be sure that you create parameters on what the use is, because you are encroaching on someone's ability to be compensated for the use of the work. It's a question of whether the 30 days should have been 30 days—should it have been there or not?

But what I would like to point out is that since Bill C-61, the rights holders have gotten together and have filed a tariff that covers exactly the same uses. When you let the market determine how the uses are going to be made, you're going to see that you don't need as many parameters. So—

Mr. Charlie Angus: Okay. Yes. So on telling students that they can't keep copies after 30 days, could we get around that with something else?

Ms. Roanie Levy: Well, the market has been able to put in place a licence that doesn't require that. The market can do that. Rights holders can choose how they want to license their work. The point is that when rights holders are given the opportunity to put business models in place, they tend to meet the user needs in a more efficient way and are able to adapt as the user needs adapt as well.

Mr. Charlie Angus: Okay. I don't want to sound gruff here, but this guy is tough; I have five minutes and I have so many things to ask because I really want to clarify this.

What interests me.... Madam Simpson, you said that fair dealing was a foreign concept in Canada, but it has been defined by the Supreme Court—

Ms. Danièle Simpson: Not fair dealing—fair use.

Mr. Charlie Angus: I'm sorry. I heard it through the translation.

Ms. Danièle Simpson: Oh.

Mr. Charlie Angus: But it was defined by the Supreme Court, so it's the elephant in the room that we have to deal with. These are rights that exist. So how do we go about...? This is the point of this discussion: how do we move forward?

If we have a levy in place.... I think a levy is a great idea. My colleagues call it a tax, but I think a levy is a reasonable way that artists get paid. But if we have a levy, do we then need the exhaustive list? For example, in 1997 the Copyright Act decided that it was legal to take an easel and a blackboard and make a quote.

Do we need to enforce that level of enforceability of artists' rights if we're going to have a levy? It seems to me that we either go one way or the other. We either go after everything that's happening in the classroom and tick it off, or we say, “Here's a levy, students, you use it”.

● (1215)

Mr. Glenn Rollans: On the topic of levies or licence fees, there have been some numbers that have gone around. Roanie mentioned $20 million a year in the K to 12 sector. In Quebec it's $9 million a year.

The overall educational resources market in Canada is about $400 million a year and that is already a stressed industry. So levies, for me, are not the solution for a working information marketplace. If you have something that compensates use on a use-by-use basis, or under a licence, a subscription, or the sale of a product, you have something that scales to the level of the activity. If it's a levy that's somehow independent of that, a levy on devices, for example, you can end up with—

Mr. Charlie Angus: Okay, so maybe I got the word wrong. Let's say Access Copyright—you guys charge a tariff per student, so—

Mr. Glenn Rollans: Yes, and so—

Mr. Charlie Angus: —if you have that, shouldn't the class be able to then use...?

Mr. Glenn Rollans: Well, under agreed terms, they should be able to do whatever they're paying for.

If a levy of $20 million.... Or if under expanded fair dealing the levy went to zero, or the tariff went to zero, does that replace the activity that's happening now in a $400-million marketplace? I don't think it will, so I think both sides lose in that arrangement. The people who are doing production now aren't going to do it anymore because they can't get paid for it, and you turn your teachers into part-time resource builders or scavengers of existing resources that are out there and not now restricted—

Mr. Charlie Angus: Sorry, but I have one last question, and then—

The Chair: One minute, Charlie.

Mr. Charlie Angus: Here's also my concern, though, in terms of looking at this, because my colleague said we're dealing with acquired rights versus the privilege to use that right. But you're also competing against a phenomenal amount of product that is now being put out there.

As I said, my magazine posted stuff. When I ran a magazine, the going fee for a photograph was $140 if I wanted to use it, whether it was a good photograph or not. Now there's flickr. Flickr has posted millions of photos from people who don't want compensation. If I were running a magazine now, I could get a lot of copies, a lot of photographs, for free, unless I was dealing with a heavy-duty professional who I was paying.

Is that not part of the issue? We're dealing with people posting academic articles. They're putting up research. They're giving it out into a general comment. How do we then maintain a market so that we can continue to create?

Ms. Roanie Levy: Along that line, I think that because some people find value in their business models to giving something away for free, it's not that everybody needs to give everything away for free. I think there is a difference—

Mr. Charlie Angus: No, but I'm saying it devalues the price, right?

Ms. Roanie Levy: Right, but the market will sort that out, and business models—

Mr. Charlie Angus: Educators can use free stuff as opposed to paying, so—

Ms. Roanie Levy: And that's part of.... That's fine. That's not the problem. It doesn't mean because educators can use free stuff that everything they use should be free. I think that's a big difference.

I would just like to point out—

The Chair: Make it very short, please.

Ms. Roanie Levy: Yes. I need two points of clarification.

Mr. Charlie Angus: See, it's such a big discussion—

Ms. Roanie Levy: Yes. First, the Supreme Court of Canada, in the CCH case, did not create a fair use. It did not do that. It was very specific. It said that you still had to meet one of the permitted purposes. So it did not create fair use. I think that needs to be clear—

Mr. Charlie Angus: No, but it recognized it as a definable user...it said that fair dealing...[*Inaudible—Editor*].

The Chair: Okay—

Mr. Charlie Angus: It did define it, so it's not a foreign concept.

The Chair: Okay. We have to move on. Again, we keep going over time.

Mr. Del Mastro, please.

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

Well, we had a little discussion on emerging and digital media, and a copyright discussion broke out. It seems as though, despite the fact....

What I had really hoped for, and what I think we're hoping to do, to steal a phrase from *Star Trek*, one of my favourite shows when I was a kid, is to boldly go into this new universe and leverage all the opportunities there are for Canadian artists to expand their reach and to in fact enrich them from a monetary perspective. Also, we want to make sure that there's greater access, more enhanced access, to Canadian artists within Canada and beyond.

I think that's really where we want to go with this. We want to come up with a strategy and recommendations for the minister and the government to help us take advantage of these opportunities.

With respect to copyrights, I understand that they're part and parcel of this. I understand that you want an environment in which, as you said, good fences make good neighbours. You want to know what the fences are. I understand that. In Canada, we've been working since 1996 to update our copyright laws. That battle continues.

There are a couple of things I want to ask. I'd like to play a little bit of the devil's advocate with you, not because it's my position, but just to give me some idea of what you deal with when you're talking about copyright.

On the issue of fair use or fair dealing or “such as”, part of the reason we have to rewrite a copyright bill is that technology has changed, and our copyright bill is no longer protecting copyright holders. We have the problem of illegal redistribution in Canada. Other jurisdictions see us as a violator. I've met with those other jurisdictions. I'm sure that other people around the table have.

If we don't create a bill that is somehow adaptable in some way, we'll be back in this position. We might be back in this position much sooner than we were last time, because technology changes much more rapidly now than it did even a few years ago.

If we're not prepared in any way to look at fair dealing or the way fair dealing is written, what would lead you to believe that the next copyright bill would be any more prepared for or adaptive to emerging technologies than the one we have before us right now? Why wouldn't we be back in this position in a year or two or whatever?

● (1220)

Ms. Roanie Levy: I think it goes back to the question Mr. Coderre asked earlier.

There is just so much we can do in predicting the future without creating a significant risk for the rights holders of actually taking away what we're trying to build for them. On the one hand, we want to strengthen copyright so that they can in fact monetize their work in the digital environment and come up with new business models. On the other hand, we're going to create an exception that is vague and open-ended and that we're going to give to the courts so they can figure out how it will play itself out in the marketplace. We're almost giving with one hand and taking away with the other.

There's just so much we can do in trying to deal with the unpredictable future. One important thing that comes up often in our world, and that I have seen in many other industries, is that people confuse “access” with “free”. Copyright collectives, for example, can be used to deal with that uncertain future and ensure that there is access to the use of works.

A private copying regime is a type of collective administration of copyright. It ensures that there is compensation on the one hand and use on the other hand. Perhaps there are other tools that exist, without our creating this big open hole that will seriously undermine the strength of the copyright.

Mr. Dean Del Mastro: I guess I have a little different take on it. Mr. Angus accurately outlined my opposition to a levy on digital storage devices. I actually think that if you cut out illegal redistribution, that becomes redundant. That's my view.

I would agree with Mr. Rollans that most of the levy regimes really contribute small amounts of money in a vast industry. I think establishing the playing field properly, and correctly setting up the business model.... I have no qualms conceding that the business environment right now in Canada is not what it should be, when people can access things for nothing, reproduce them for nothing, and transmit them for nothing.

I think that's a problem, but I believe—

[*Translation*]

Mrs. Carole Lavallée: I have a point of order.

We have no translation.

[*English*]

Mr. Dean Del Mastro: It's just as illogical in French.

[*Translation*]

Mrs. Carole Lavallée: That's good, now; that's fine.

I heard nothing of what you said, Mr. Del Mastro. That's too bad.

[*English*]

Mr. Dean Del Mastro: No worries.

Mr. Charlie Angus: Start over, Deaner.

Some hon. members: Oh, oh!

The Chair: Is the translation okay now?

[*Translation*]

Mrs. Carole Lavallée: Point of order! Point of order!

[*English*]

Mr. Dean Del Mastro: Just to come back around and close the circle, your position is that fair dealing, as known or as indicated in the act from 1988, I believe.... That is your position on fair dealing? Would you make any changes to fair dealing? Is there any way you would look at it and say that here's something we can change?

I think there are a number of things we need to look at, whether it's a mandatory statute review of copyright every few years so that we don't actually have to rewrite a bill every time, so we could actually review it and change it.... These sorts of things I think should be in any form of copyright regime. But I also think we should be prepared to look at something like fair dealing and say, how do we make sure it's reflective, providing protections, but is also in some way consistent with the time?

● (1225)

Ms. Roanie Levy: One thing I'd like to point out is that this challenge you're outlining is a challenge that pretty much every country looking at their copyright acts has to live with all the time. Everybody is dealing with this, yet we have less than a handful of countries that have an actual "fair use" exception. We have another handful of countries that have a "fair dealing" exception with a narrowed-down list, or an exhaustive list. It is a challenge that exists everywhere.

A mandatory statutory review perhaps would be a way of making sure the bill continues to be up to date. But I think what's very dangerous, and what we do not recommend, is the challenge of trying to identify which uses can be made without compensation without it being handed to the courts. I think that's what happens under fair dealing. And that is the bottom line.

Mr. Dean Del Mastro: Thank you.

The Chair: We have to move on now to Mr. Simms, please.

Mr. Scott Simms (Bonavista—Gander—Grand Falls—Windsor, Lib.): Thank you, Mr. Chair.

Some of the material that you've put out there—this is for Access Copyright, by the way—says that "an open-ended fair dealing provision...puts in the hands of the courts what should be determined by Parliament". That being said, two pieces or two court rulings that have been very important to this debate over the past little while, and that get cited quite often, include Théberge and CCH v. Law Society of Upper Canada, which many of us refer to.

In the ruling, they stated, "The Copyright Act is usually presented as a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator." So obviously, they delved into this by talking about the balance. They say, "Excessive control by holders of copyrights and other forms of intellectual property may...create practical obstacles to proper utilization".

Is this what you're talking about when you say that it's left up to the courts? First of all, in that ruling, do you agree or disagree? Do you think that's excessive for a court to say?

Ms. Roanie Levy: No. I think that is correct. There is a balance between the user and the copyright. I don't think that is inappropriate for the courts to say.

But the one thing the CCH case did, for example, is look at a series of conditions, or criteria, six of them, to determine whether the use in that particular case was fair. The court said the impact on the market—and there are a whole bunch of these, how much of the work was used, etc.—is a condition, an important condition, but it's by far not the most important condition.

I wonder how this committee would feel about an exception where there is an important impact on the market. Some of the things the court was not able to look at were the impact on innovation, the impact on jobs, the impact on creativity, the impact on cultural policy—

Mr. Scott Simms: In this decision—CCH.

Ms. Roanie Levy: In this decision or in any decision.

Mr. Scott Simms: Okay.

Ms. Roanie Levy: It is very difficult for the court. The court does not have the impact analysis that is usually part of policy-making and changes in the legislation. That is part of the process when law-making happens, when there's a change in policy.

With fair dealing, and with an expansion of fair dealing, what we're saying is that we're going to leave it up to the courts to determine whether or not a use has to be compensated, whether it should fall into an exception under fair dealing, or whether there should be payment, without all of this impact analysis that would usually happen before a new exception is created in the Copyright Act. That is what's very concerning.

Mr. Scott Simms: So what you're saying is that by injecting into legislation the "such as" phrase, and trying to be more illustrative.... Sorry, it's a little bit of both, I suppose. But in trying to illustrate an example of infringement, what you're saying is that it's not a good way to go because we box the courts into corners. Is that correct?

● (1230)

Ms. Roanie Levy: No, no, quite the opposite. It's not a question of boxing the courts into a corner. What happens is that you give free rein for the courts to determine—

Mr. Scott Simms: That's right.

Ms. Roanie Levy: —what the policy should be, as opposed to Parliament determining what the policy should be. That is an important distinction, a very important distinction. The courts are not elected officials.

Mr. Scott Simms: Okay. I think what we end up with at that point, by providing legislation that way, is that we get to revisit it every two or three years, and it has to evolve with the coming technology, whatever that may be.

There was an article in "Legal Report" some time ago—you were quoted in it, actually—regarding the case about parodies and how parody is a form of copyright infringement. You said, and I quote:

> The law is not clear. In my opinion, [an exception for parody] is there. But we don't have a lot of case law in Canada.

You're calling for "a specific limited exception for such works".

Ms. Roanie Levy: That's an example where you could have an exception created for parody. There is, in fact, no clear exception for parody in our Canadian legislation. Some argue that it is embedded in fair dealing; others say it is not. This is one of the problems with fair dealing: you never know.

You never know. Even if it's open-ended, as a user, you never know whether you're in or you're out. So there are two ways of approaching providing, ensuring, access when we're actually dealing with a policy position where we feel we need to ensure and allow access as opposed to it being an issue of payment.

If access needs to be provided for a work, for example, in the case of parody, there is a justifiable public policy reason why access should be allowed. Then you could create what I call “four corners exceptions”. What are they? Those are exceptions that are defined in such a way that people know whether you're in the box or outside the box. If you're in the box, you don't need to worry as a user; you don't have to ask for authorization or pay. If you're outside of the box, then we're dealing in an area where you need to ask for authorization and, at times, payment as well.

Those are four corners exceptions and we have examples of them in our Copyright Act. So this is an example: for a good public policy reason, you create a four corners exception that says there's an exception for parody.

The Chair: Mr. Simms—

Mr. Scott Simms: Sorry, is this—

The Chair: I'll give you the chance for one little short one.

Mr. Scott Simms: Oh, you know what? I wanted others to comment, perhaps.

The Chair: Okay.

Mr. Scott Simms: I had another subject, but I don't have the time. Perhaps others would like to comment on that.

Ms. Simpson.

The Chair: We might have another....

Okay. Ms. Simpson.

[*Translation*]

Ms. Danièle Simpson: I'd like to add something to what Roanie said and I'm speaking right now solely on behalf of the artists. If there is any expansion of this notion of fair dealing, you will strip artists of income and you will also impose on them the financial burden of proving that they own those rights. This is becoming absolutely impossible. In any case, very few artists can afford that. Claude Robinson is an extraordinary being.

[*English*]

The Chair: Thank you.

We move on now to Madam Lavallée.

[*Translation*]

Mrs. Carole Lavallée: Quite curiously, you conclude with the one case I wanted to talk to you about, Claude Robinson. I'd like to summarize that case for the people around the table because not everyone knows the story of Claude Robinson. Mr. Del Mastro, do you know the story of Claude Robinson?

No. We do have two solitudes.

Claude Robinson is an artist who was extremely prolific 14 years ago and who, to assert his copyright, had to sue Cinar, an international animated film company. You may have heard about it because it was a scandal here in Ottawa. The company was accused of fraud and of using nominees.

Claude Robinson sued Cinar. In fact, he has been suing them for 14 years. He is a creator, an artist who has produced nothing in 14 years because he has had to become an investigator and lawyer to defend his case. He won at trial, but the rich and powerful international companies, including Cinar, appealed. He still has to defend himself in court. He has no more money. Imagine.

In Quebec, there has been a solidarity movement as I believe there only is in Quebec. Two hundred and fifty thousand dollars has been collected for him. The amount is even $262,000 because I took up a collection in the Bloc québécois. This copyright problem is obvious in Quebec and very well known. Everyone talks about Claude Robinson. We must not transform our artists and creators into lawyers.

You tell me that fair dealing would transform artists into lawyers. Is that correct?

● (1235)

Ms. Roanie Levy: That's correct.

Mrs. Carole Lavallée: All right.

An hon. member: That's terrible.

Mrs. Carole Lavallée: I don't know who you're talking about.

[*English*]

Ms. Roanie Levy: That is why we'll let the non-lawyers answer to the challenge of actually turning them into lawyers.

Mr. Glenn Rollans: Thank you.

I'm not sure whether you are pausing for an answer, but my—

[*Translation*]

Mrs. Carole Lavallée: Wait a minute, I don't have any translation; I don't know what happened.

[*English*]

Mr. Glenn Rollans: I think this may respond to several points or questions that have been made. I think you do run the risk, if not of turning them into lawyers, then of turning them into litigators, where they're always in court working to clarify the system.

I think the question of flexibility and the question of adaptability will be partly answered by any specific answer to the question. If the Copyright Act comes out with clear borders, if the limits of fair dealing are clearly expressed, and if the exceptions to infringement are clearly expressed.... We've mentioned parody as an exception that would be very easy to countenance and an educational exception as one that would be very difficult to countenance.

I think if those things are clear, along with a reinforcement of the role of collectives, I think what you're going to see is an end to some of the litigation that's going on in the background—or in the foreground now—and an end to some of the prospect of litigation. If the rules are clear, people will get back into a working relationship between creators and users of copyrighted, protected work. Users, especially large-scale users, aren't going to be tempted to call a halt to the discussion about what they might pay for a resource while they work to see whether they can get it without payment.

Those rules, if they leave grey areas but reinforce the role of collectives and the role of the transaction between copyright holders and copyright users, will send people back to the bargaining table, in a sense, where we will, as suppliers to people who use information, be offering the information at a reasonable price with reasonable terms of use. If the response is that they'd like different terms, then we would talk about that.

Collective licensing is one way to work around that; direct licensing from an owner, such as a visual artist to a user, is a way around it; and the ordinary price that you see on the back of a book or an online digital book is a way to do it.

So in a sense, an update could simply be a reconfirmation of the terms that are in the Copyright Act now. That would work to some extent as an update, clarifying the field of play and getting people back into a reasonable relationship.

[*Translation*]

Mrs. Carole Lavallée: I have a lot of comments to make, but I absolutely want to ask Mr. Cornellier a question. Mr. Cornellier, you represent photographers, but here we're not talking a lot about photographers.

[*English*]

The Chair: Keep it very short, Madam Lavallée, please.

[*Translation*]

Mrs. Carole Lavallée: I understand your interest in advocating photographers' copyright, but there is, on the one hand, the art photograph and, on the other hand, what I would call the useful photograph, such as the official photo of a member of Parliament, for example. In the case of an official MP photo, how can you consider that a photographer would retain copyright for that kind of photograph? Wouldn't there be a way to reach an agreement?

Mr. André Cornellier: There's always a way to reach an agreement, and that's why we have contracts. When you put a contract on the table, both parties read it, negotiate, say they don't like clause 1, 2 or 4. They change it, negotiate and agree all the time. As long as you work with contracts, there's no problem; people agree. People submit a request to us, we answer it and we write it into the contract. Contracts change; they aren't fixed.

It's obvious to us that we have to own our works. Consider Yousuf Karsh, who photographed the greatest thinkers on the planet and everyone. He was subsequently able to assert copyright because he had retained it, but if you don't have copyright, you can't live off your pension later on when you retire. You have very specific needs, and we respond to them; there's no problem. However, you don't need all rights in order to meet your needs. We need those rights so that we can publish, create an art book later on or something else. You say it's just a picture of a politician.

● (1240)

Mrs. Carole Lavallée: Yes.

Mr. André Cornellier: It may be someone very important.

Mrs. Carole Lavallée: If your gentleman calls me, I will assign the rights to him.

[*English*]

The Chair: Thank you.

We'll move on now to Mr. Del Mastro.

Mr. Dean Del Mastro: Thank you.

Mr. Rollans, Lone Pine is an educational publisher. As I'm sure most of us have, I have stacks of textbooks in my garage that go back to my days at university: finance, accounting, business law, and economics. It's all wonderful stuff. I sure wish I had it digitally so that I could access it more easily and store it in a much smaller space.

Is the time here now or is the time coming when these textbooks will in fact be a digital resource? And how are you adapting to that?

Mr. Glenn Rollans: I should clarify that Lone Pine Publishing is a trade publisher. I left the educational business partly because of the uncertainties around publishing for education.

Mr. Dean Del Mastro: I see.

Mr. Glenn Rollans: But my experience as a partner in Les Éditions Duval was especially in the K-to-12 world, the grade school world, and I had some contact as well with post-secondary.

To some extent the answer is that it is here now. Digital transactions and digital resources are happening much more commonly in education than they are in the trade world, the world of bookstores, and consumer products. Teachers demand it. Professors demand it. When it's not forthcoming from producers—publishers, authors, and others—they have other options. They can go to open source materials. They can do user-created materials. That's something that has the industry paying attention, so they are working very hard to provide the materials that are requested by the system in the form that the system wants.

Over the past couple of years, I had a chance to do some consulting for Ministry of Education in Alberta and some for Canadian Heritage on describing the educational publishing system. What's really clear is that there is not going to be a wholesale, immediate transition. Some learning purposes demand paper. Some users demand paper. Alberta, for example, has some cultural groups that refuse to use digital technology because it conflicts with their faith. They'll never be using digital resources, and they still come under the education act.

So I foresee a fairly long transition, wherein the balance between digital and paper is shifting but both remain in use, and probably paper will remain in use over the long haul. In the meantime, it's a functioning marketplace between the producers and the users. The users really are demanding it, and they're purchasing it under terms that are acceptable to producers.

Mr. Dean Del Mastro: That's interesting, especially given that there's a bit of a generational separation and that younger people are far more exposed to or are already using this type of digital format in a much more profound way than older generations. We certainly see this with newspapers. I don't have a newspaper subscription, except at my office, but my mother and my grandparents have newspaper subscriptions. I think people who are younger are even less likely to have a newspaper subscription whereby they pay a person for the paper at the door.

The question is whether there is an opportunity to use this digital transition in educational publishing, or otherwise for publishing, to reach even farther. Or is it a defensive kind of stance for Lone Pine?

Mr. Glenn Rollans: At Lone Pine, we've invested in preparation for it. But in the book trade, we're still in a defensive stance. We're concerned about letting the horse out of the barn, because digital transactions are such a small part of the marketplace at this point—1% to 5%. It's not that we're persisting in an old business model in the book trade: we're persisting in the current model. If 95% of buyers are buying in paper form, even though digital opportunities are there, you can't not take care of the print world.

That said, my experience in both education and trade says that people are really excited about the digital opportunities. We want access, we want people to come to our material, and we want them to find what they need. We want them to use it in new ways, with searchability and built-in functionality that are not possible in print. But we need to find a way to be compensated for it.

If you're like me—and I think many of you are—I have an iPhone on my hip, a laptop in my bag, and *The Globe and Mail* in my other bag. None of this stuff goes away, and if the industries are being asked to produce in all of those formats for a declining revenue stream, something has to give. It's not just a reluctance; it's not being technology-averse that stops us from going there. It's that the marketplace has to come to it for us to be able to invest in it. And for the marketplace to come to it, we need clear rules that tell people what's free and what's not free.

● (1245)

Mr. Dean Del Mastro: Am I done?

The Chair: You're done.

Mr. Dean Del Mastro: Okay.

The Chair: You could have another little chance yet, because Ms. Dhalla is on right now.

Ms. Ruby Dhalla (Brampton—Springdale, Lib.): Thank you very much to everyone for coming here today. Your presentations were extremely interesting and insightful.

I want to follow up on a couple of comments that Roanie made in respect to the impact analysis not taking into account the innovation and the creativity portion of it.

Could you please provide some insight for the committee itself, in terms of the recommendations we have to prepare, on what you perceive as the impact analysis as seen from the aspects of innovation and creativity?

Ms. Roanie Levy: For talking about innovation and creativity, probably my colleagues around the panel are in an even better position, because they are the innovators and the creative forces around the creation of published works and of other works as well.

I talked about the impact analysis that would be lacking. An analysis that would be done by the courts to determine whether or not a payment should happen is the type of analysis we see happening all the time before exceptions are created. On the one hand, the analysis would look at whether we're dealing with an access challenge or whether it's a payment challenge.

That analysis would happen. Then, what would happen if you were to create an exception? What would happen to existing business models? What would happen to future business models? What would happen to jobs, what would happen to investment, and what would happen to innovation? Et cetera.

Mr. Simms referred to the Supreme Court of Canada decision and the fact that it's a balance. It is a balance. Many people have come to you saying that we have to change the balance here and change it there.

We would all agree that it's a very difficult balancing act to even figure out what the balance should look like. It is difficult because it involves all of these very important social, economic, and political issues that need to fit into the balancing act. You need a lot of analysis and evidence and need to understand what the implications of it are before you're able to say that you're going to allow this use without compensation to the rights holders. That is what, in a fair dealing context, we're saying we'll let the courts determine, and that's a big risk.

But talking about innovation, I think Glenn mentioned it, as did others.

Ms. Ruby Dhalla: In the last few minutes that I have left, I will ask you what I have asked all the witnesses who have come forward. As we prepare our recommendations and talk to a variety of different stakeholders, organizations, and advocates, what is one recommendation that each of you would give to the committee and to all of the members to help ensure that Canadians benefit from digital and new media, while also ensuring that government has the policies, programs, and initiatives under way to deal with it?

What's one recommendation that you would be able to provide? We can start with Glenn.

Mr. Glenn Rollans: I'll come back to clarity. If the rules of the game—let's call it that—are clear, I think there will be a lot of flexibility within the rules and a lot of innovation. When the rules are unclear, people tend to sit back and argue about “ifs” and “ands”. So clarifying early, and I think regular review as part of the future as well, but I'd say that it's clarity.

Ms. Ruby Dhalla: André?

Mr. André Cornellier: From my point of view, I think it's basically the way that the law will settle a small problem, because if it's clear on the basis of the law, like copyright exists and people own their rights and everything.... The question of trying to solve the problem of each of the media, or each support, or each way that we're going to distribute, will never be solved; this will always evolve. The problem is simple, as you've put it, at the base. You say that this is owned by these people, and obviously it's my goal to sell more and more. I will go out into the marketplace and sell it. The price will vary depending on the demand, and we'll adjust all the time. If there's no such rule as that, I don't know where to go; I cannot do it.

Basically, for me, if I produce something, I own it, and the government should not try to be technologically correct, because it's impossible. When books and printing came along 100 or 200 years ago, a big problem was created, but the problem was solved after a few years. We are in the midst of technology. Technology creates problems, but technology also always solves the problems. We're just in the middle of it and we don't know. In a few years those problems will be solved if we have access to our rights and we can negotiate it.

● (1250)

Ms. Roanie Levy: I was going to say legal certainty, but I think Glenn took that away from me. So instead of legal certainty, I will reiterate something I've mentioned a few times already today, and that is, don't put in the hands of the court what should be determined by Parliament.

[*Translation*]

Ms. Marie-Louise Nadeau: To be able to adopt an international position, we have to go back to the fact that fair use was rejected in England and New Zealand, and we have to ask ourselves why. That's what is important, I think. Canada is a signatory to the Bern Convention. That's important.

I also want to go back to what Glenn said about clarity. We're in contact with users every day. The clearer it is, the simpler it is. People are ready to pay certain royalties that aren't costly. School royalties are not high. If it's clear, it's perfect. People are ready to pay.

Ms. Danièle Simpson: I'm also in favour of clarity, but you have to maintain the current balance between user rights and creators' rights. Compensation for creators should not be considered a constraint that you have to disregard in order to achieve greater flexibility. That doesn't give artists any.

[*English*]

Ms. Ruby Dhalla: Thank you.

The Chair: Thank you for that.

I'm going to bring this meeting to a conclusion.

Thank you very much for....

Did you have something, Mr. Pomerleau?

[*Translation*]

Mr. Roger Pomerleau (Drummond, BQ): Then I'll have a point of order.

[*English*]

The Chair: Okay.

I'm so pleased with your candid answers. We are going to move forward on this with some recommendations.

Again, thank you for coming today.

The meeting is adjourned.

Mr. Roger Pomerleau: The meeting is adjourned?

[*Translation*]

Next time, could we consider the possibility of having a clock?

[*English*]

The Chair: A clock? Yes.

Thanks for that.

Published under the authority of the Speaker of the House of Commons

SPEAKER'S PERMISSION

Additional copies may be obtained from: Publishing and Depository Services
Public Works and Government Services Canada
Ottawa, Ontario K1A 0S5
Telephone: 613-941-5995 or 1-800-635-7943
Fax: 613-954-5779 or 1-800-565-7757
publications@tpsgc-pwgsc.gc.ca
http://publications.gc.ca

Also available on the Parliament of Canada Web Site at the following address: http://www.parl.gc.ca

Publié en conformité de l'autorité du Président de la Chambre des communes

PERMISSION DU PRÉSIDENT

On peut obtenir des copies supplémentaires en écrivant à : Les Éditions et Services de dépôt
Travaux publics et Services gouvernementaux Canada
Ottawa (Ontario) K1A 0S5
Téléphone : 613-941-5995 ou 1-800-635-7943
Télécopieur : 613-954-5779 ou 1-800-565-7757
publications@tpsgc-pwgsc.gc.ca
http://publications.gc.ca

Aussi disponible sur le site Web du Parlement du Canada à l'adresse suivante : http://www.parl.gc.ca