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Chair

Mr. Glenn Thibeault

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● (1535)

[*English*]

The Chair (Mr. Glenn Thibeault (Sudbury, NDP)): Good afternoon, ladies and gentlemen and members. Welcome to the third meeting of the committee studying Bill C-11.

We want to remind all members that as part of our first meeting we asked to have all these meetings televised, so I'm expecting you to be on your best behaviour.

With that, I'd like to start by introducing our witnesses today. We have Mr. de Beer, an associate professor at the Faculty of Law at the University of Ottawa; Mr. Trosow, an associate professor at the University of Western Ontario's Faculty of Law and Faculty of Information and Media Studies; and Mr. Gannon, a lawyer at McCarthy Tétrault. Welcome, gentlemen.

I believe we'll start off with 10-minute presentations. I'm giving you my very friendly and nice warning now that at 10 minutes I will step in and unfortunately cut you off if you haven't wrapped up by that time.

We'll start with the first person on the list. Mr. de Beer, if you're ready to get under way, please go ahead.

Professor Jeremy de Beer (Associate Professor, Faculty of Law, University of Ottawa, As an Individual): Good afternoon. My name is Jeremy de Beer. I'm an associate professor in the faculty of law at the University of Ottawa.

My research focuses on law, policy, and business issues related to intellectual property, technology innovation, and international trade. I teach, among other things, courses on global intellectual property policy and the digital music business. I'm also a practising lawyer who has worked with copyright stakeholders of all kinds, from creators and producers to intermediaries to end users and consumer groups. Before becoming a professor, I was the legal counsel for the Copyright Board of Canada. That's the economic regulatory agency responsible for the administration of copyright in Canada.

That said, all the views I'm going to express today are my own and are based on my scholarly research and my professional experience.

The Government of Canada should be congratulated for its commitment to copyright reform, and I, like many other Canadians, look forward to the eventual passage of Bill C-11, the Copyright Modernization Act, into law. This committee's work in that context is extremely important, and I'm grateful for the opportunity to participate in the process of making Canada's copyright laws among the most appropriate and effective in the world.

Because I'm not here today representing any particular organization or any particular perspective, I'm not asking this committee for any specific amendments to the bill. However, in an effort to facilitate evidence-based policy-making, I hope this committee will draw its own conclusions about the appropriate course of action suggested by my research and experience.

If I may, I would like to discuss two aspects of the Copyright Modernization Act that have attracted attention from various stakeholders throughout the copyright reform process. The first relates to the provisions regarding technological protection measures in the proposed sections 41 to 41.21, and the second is the addition of the words “education, parody or satire” in the proposed new section 29. I would be pleased to address other issues during the question period, if you would permit me to.

There's no doubt and little controversy about the fact that international treaties to which Canada is a signatory require reforms to provide adequate protection and effective legal remedies against the circumvention of technological protection measures. The only real question is whether Canada ought to adopt the approach taken by some countries, such as the United States, or the approach taken by other countries, such as Switzerland and New Zealand. This is a difficult policy decision.

While there are differences between the anti-circumvention provisions in Bill C-11 and the anti-circumvention provisions in the American Digital Millennium Copyright Act, these approaches are similar for failing to link liability for circumventing technological protection measures with an act of copyright infringement, so Bill C-11, as it's currently proposed, could prohibit the circumvention of technological protection measures even if those measures are applied to materials in the public domain or even if the purpose of the circumvention is a lawful purpose, including the exercise of rights that are provided elsewhere in Bill C-11.

In contrast, recent reforms in Switzerland and New Zealand link circumvention provisions with copyright protection and with copyright-protected works.

My research suggests that there are four reasons to be concerned about the approach currently proposed in Bill C-11. I have provided the committee clerk with copies of some of my relevant publications and I understand these will be translated and distributed to you. Those documents explain the conclusions that can be drawn from this body of research in more detail.

First, this model of anti-circumvention provision is conceptually and pragmatically inconsistent with other parts of Canada's existing and proposed legislation, specifically with rights to engage in private copying under part VIII of the Copyright Act as well as other provisions in the bill. My research contrasting Canadian and American law related to private copying and technological protection measures suggests that if private copying is otherwise allowed by virtue of a levy or other provisions, it ought to be lawful to exercise private copying rights irrespective of the presence of a technological protection measure.

Second, my research shows that there are serious unresolved legal questions about the constitutionality of anti-circumvention provisions if those provisions do not reflect the fundamental contours of copyright as that term is defined in the Constitution Act of 1867 in dividing jurisdiction over matters between the federal and provincial governments. Regulation that is in pith and substance about private contractual matters or technological protection measures trumping the balance of rights established by copyright law risks being invalidated as an intrusion into areas of provincial jurisdiction. The Supreme Court's recent ruling in the securities reference reinforces a risk that under the approach proposed in Bill C-11, these reforms could be ruled unconstitutional. As a worst-case scenario, the baby could be thrown out with the bathwater.

My research suggests that narrowing the provisions to permit circumvention for lawful purposes substantially reduces that risk. It virtually guarantees that the legislation will be upheld as constitutional.

Third, my research suggests that strict anti-circumvention provisions would do little to help Canadians exploit the potential of new markets based on open innovation, collaboration, and peer production, which are identified by many experts in business and management schools as the most promising avenues for economic growth, innovation, and productivity over the coming decades.

Evidence suggesting the contrary—that is, that anti-circumvention provisions are needed to enable new business models—does exist, but it's so far theoretical rather than empirical. Moreover, the research that does exist, the empirical research, suggests that strict anti-circumvention provisions risk the unintended consequence of counterproductively stifling competition by tying digital content to particular platforms, devices, and distribution models. That's a risk that, if possible, I think Canadians want to avoid.

Fourth, my most recent data shows that the majority of experts who have published research about anti-circumvention provisions are not supportive of a model that fails to link circumvention liability with copyright infringement. In a thorough, systematic, and objective overview, I and a team of researchers reviewed almost 1,500 articles published in various databases on this topic.

Our review of approximately 1,500 articles revealed that only a tiny fraction—10%—concluded that they were supportive of anti-circumvention provisions. Thirty-four per cent of authors of these studies were neutral, while 56% of authors in publications such as these were unsupportive of this particular model of anti-circumvention law.

So while this empirical data can't be interpreted to conclusively represent public opinion, or even the views of all stakeholders, it does indicate a substantial consensus among experts who have published research on this topic. The data provided to support that is in the documents that I've circulated to the clerk.

In light of this evidence, the committee may wish to consider whether the approach taken toward anti-circumvention in New Zealand or Switzerland is a more appropriate model for Canada to follow. I would be pleased to provide you with more specific details about how precisely that can be done if the committee wishes to do so.

Before that, the other topic I would like to mention very briefly concerns the implications of adding the words “education, parody or satire” to section 29 of the act, and especially the word “education”. I understand that some stakeholders have expressed worries that these words are too vague and will lead to significant litigation and reductions in revenues collected by authors and publishers of educational materials.

First, if indeed there were extensive litigation required to interpret the scope of the new provision, then it's arguably impossible to conclude yet whether there will be any effect—negative or positive—on royalty payments and revenues in Canada. I can testify as former legal counsel to the Copyright Board of Canada, which is tasked with regulating economic aspects of copyright such as this, that any royalty structures that emerge will be fair and equitable.

I can also testify that the possibility of litigation over the meaning of these new provisions is not a sound basis on which to reject their inclusion in Canadian copyright law. In fact, if there's anything we can predict with certainty, it's that many of the provisions in Bill C-11 will be tested in courts. That's to be expected.

I'm not suggesting that it would not be helpful for Parliament to provide courts with guidance: for example, on factors that it considers relevant to the fairness of any particular dealing with a copyright-protected work. But in my professional experience, I can suggest that it would be dangerous and inappropriate to entrench too much specificity into the definition of categories that must, by their nature, be flexible and fair.

Again, thank you very much for the opportunity to participate in this process. I look forward to elaborating on these issues or responding to any questions.

● (1540)

The Chair: Thank you, Mr. de Beer. Congratulations: you are under 10 minutes.

I'll now hand it over to you, Mr. Trosow.

Professor Samuel Trosow (Associate Professor, University of Western Ontario, Faculty of Law and Faculty of Information and Media Studies, As an Individual): Good afternoon. I want to begin by thanking the committee for inviting me as a witness. My name is Samuel Trosow. I'm a professor at the University of Western Ontario. I teach in the faculty of law, and I also teach in the faculty of information and media studies, which houses the journalism program, the media studies program, and the library and information science program.

Copyright policy is the main focus of my research, particularly as it pertains to new technologies. I'm going to focus my comments today on the aspects of Bill C-11 that most directly affect teaching, learning, and research in our educational communities. Bill C-11 is not a perfect piece of legislation, but I want to focus on something in it that I believe the government got very right, and that is the fair dealing provisions.

Fair dealing is the right to copy works without permission or payment, but only when it is fair to do so. Fair dealing is recognized by the Supreme Court of Canada as an integral part of the Copyright Act and a critically important right for all Canadians. The challenge for copyright policy has been to find the balance between often disparate stakeholders in order to promote learning and progress, to compensate creators, and to encourage new works. To do this, copyright creates a limited monopoly in the sense that owners are given very powerful, exclusive rights over their works, but the monopoly is limited in terms of its length and by users' rights, such as fair dealing.

What you must do is ensure that copyright policies enable new forms of learning and creativity and at the same time ensure that creators of intellectual goods have reasonable levels of protection in the digital environment. This is where the importance of fair dealing really comes into play. There are times when, whatever particular hat we are wearing, we need to access and use information resources. The Copyright Act currently permits fair dealing for the purposes of research, private study, criticism, review, and news reporting.

In the 2004 Supreme Court of Canada decision, CCH Canadian Ltd. v. Law Society of Upper Canada, fair dealing was identified as an important users' right, one that's integral to the overall balance sought in the Copyright Act. This interpretation is consistent with changing practices and quite appropriate in a technology-intensive information environment. But in the context of educational institutions, there remains a degree of uncertainty about the scope of fair dealing, the current language for which was essentially adopted from the 1911 version of the Copyright Act of the U.K. when the Canadian act was passed in 1921.

In the lead-up to Bill C-11's predecessor, the educational community was unanimous that the fair dealing categories needed to be clarified. The suggestion was to add the words “such as” before research, private study, criticism, review, and news reporting, and then to state the six fairness criteria adopted in the CCH decision. Bill C-11 does not go the “such as” route. Instead, it adds three specific things to the list: education, parody, and satire. While I would have preferred the inclusion of “such as”, the current proposal is a very reasonable compromise.

This provision has become a lightning rod for opposition and has given rise to several claims that an expanded fair dealing is all about saving money and that it will result in widespread copying of texts that will disable Canadian publishers and creators. One of the persistent charges being levelled by the opponents of fair dealing is that the educational sector does not want to fairly compensate creators, that schools and teachers and students want to expand fair dealing in order to save money, but nothing could be further from the truth.

Your predecessor committee on Bill C-32 heard from several groups about the massive spending the educational sector devotes to purchasing and licensing resource materials. Ernie Ingles, the University of Alberta chief librarian, told the committee last February that Canadian university libraries spend over $300 million annually on the purchase or licensing of content and that this will not change as a result of changes to fair dealing. The same point that day was made by Campus Stores Canada, which said that fair dealing does not affect the sale of course packs or the sale of text books, and they too saw no reason why this would change. The bookstores supported adding education to fair dealing as an important academic right, and they thought the concerns about mass copying were simply not founded.

Adding education to fair dealing is not about saving money, but the money will be spent in a smarter way and in a manner that will leverage these expenditures to make the content more accessible to more people, nor will the inclusion of fair dealing destroy the Canadian publishing industry and the creators who depend on it. In the United States the corresponding right to fair use for educational purposes is considerably broader than what Bill C-11 proposes. Despite these more liberal terms, well beyond what's being proposed in this bill, there is a thriving and robust publishing industry there.

● (1545)

In terms of suggestions for moving forward, if the committee wishes to clarify and limit educational fair dealing, there is a simple way to do that: include the six factors laid out by the Supreme Court of Canada in CCH into the text of the act. These factors for assessing the fairness of dealing are the purpose, the character, and the amount of the dealing, the alternatives to the dealing, the nature of the work, and the effect of the dealing on the work.

If you think educational fair dealing needs to be further clarified and defined, then by all means put this language into the act.

There is a final concern I want to mention. It's been suggested that educational fair dealing be limited to qualifying educational institutions. I would reject this approach. It would be the wrong thing to do. Fair dealing is a right for all Canadians, not just those privileged to be in an educational institution—a defined and limited term in the act. Fair dealing is not just for a graduate seminar on quantum physics. It's for a hockey coach teaching power skating skills. It's for a seniors centre running programs on nutrition and fitness. It's for a Girl Guides troop learning about the natural environment. It's for an exhibit on local history in a local museum. It's for a literacy program at the public library. It's for anyone engaged in the growing area of lifelong learning.

Yes, the clarification of fair dealing is critical for those working or studying in educational institutions, and there are additional exceptions that apply only there, but fair dealing is an important right for all Canadians from all walks of life, including authors, artists, and musicians, working inside and outside of our schools, colleges, and universities. By listing education within fair dealing's purposes, Bill C-11 strengthens and clarifies the right to the benefit of everyone, despite some of the sensational claims you've been hearing.

This change is of central importance because all of the goals articulated in the government's consultation—innovation, creativity, investment, competition, and global leadership—are best met by turning Canada into a haven for the practice of fair copyright. Canadians in all walks of life should be encouraged to engage in fair copyright practices. Practising fair copyright, which may take on different forms in different contexts, should become the hallmark of a Canadian copyright culture that reflects Canadian values.

As you proceed forward with this legislation, I urge you to pass the proposed fair dealing provision.

Thank you again for your time, and I would be pleased to answer any questions during your question period or subsequently in writing.

● (1550)

The Chair: Thank you, Mr. Trosow.

I need to congratulate you as well, since you kept it under 10 minutes.

No pressure, Mr. Gannon, and with that, I'll hand it off to you.

Mr. James Gannon (Lawyer, McCarthy Tétrault LLP, As an Individual): Thanks, Mr. Chair.

Good afternoon. My name is James Gannon. I'm a lawyer at the firm McCarthy Tétrault in Toronto. I'm really pleased to be here to speak to you and to answer your questions about Bill C-11.

[*Translation*]

I hope to shed some light on two specific areas of the law.

First off, I will talk about technological protection measures, TPMs or digital locks, as they are often called.

Second, I want to dispel some of the falsehoods surrounding the so-called enablement clause we have heard so much about recently.

[*English*]

I have just a quick introduction about myself first.

I graduated in 2008 from Osgoode Hall Law School. I've been practising at McCarthy Tétrault since then in the areas of technology law and intellectual property. I also have a degree in systems design engineering from the University of Waterloo.

The Chair: Mr. Gannon, I will just interrupt you for one second. If you could slow the pace down a little bit to help out our translators, that would be much appreciated. Thank you.

Mr. James Gannon: Absolutely. Thanks, Mr. Chair.

[*Translation*]

Last year, the Legislative Committee on Bill C-32 heard from a number of witnesses about how young people produce and use digital media. It was also said that, because of these new uses, the Copyright Act was in urgent need of reform. And yet, the committee did not hear from many young Canadians. Therefore, I also hope to share with you the point of view of a young Canadian, at the dawn of this new Parliament.

[*English*]

Let's get started with TPMs.

TPMs are technologies designed to control the way that digital media can be accessed and copied. Bill C-11 would make it an infringement of copyright to circumvent the TPM or to manufacture and distribute the circumvention devices. Legal protection for TPMs, or technological protection measures, has been enacted by all of Canada's major trading partners pursuant to the WIPO Internet treaties.

We often hear these technologies being referred to as “digital locks”, but I think that's a total misnomer; we should not think of TPMs as restrictions somehow meant to frustrate consumers but as an essential element of a thriving digital media marketplace. If there's one thing I'd like to accomplish in front of the committee today, it's to get rid of that “digital locks” label and to turn the focus back on what these technologies are and how Canadian copyright should protect them so that we can sustain a vibrant Canadian creative marketplace.

I'll give you a couple of examples.

I wouldn't call the TPM that's used on the Spotify music service a digital lock, because if you subscribe to the Spotify service, you can connect to and stream music from Spotify in unlimited amounts. You have access to a massive catalogue of music that you can stream at any time. What that TPM will do is prevent you from copying that stream and making your own local copy on your own hard drive. Otherwise, the only thing you'd need to do is subscribe to Spotify for a month, copy every piece of music they are offering, and cancel your subscription. The TPM stops you from doing that, but it doesn't stop you from having access to that stream at any time.

Even online video distribution services are using TPMs in very beneficial ways. For instance, through Blockbuster online you can either rent or buy movies from the Blockbuster website. There are not a lot of stores left in real life, but they have an online business now. If you rent a movie through Blockbuster, you get that movie file; it will cost you $3, but you get a TPM on that movie, and it causes the file to erase itself after 30 days. If you buy that same movie, it will cost you a bit more, maybe $20, but that file will not delete itself. Really, it's the TPM that makes that rental distribution model happen: without the TPM, there would be no difference between the rental and the purchase model.

We often hear that these cultural industries need to find new business models for their products; I think they're already here, but they rely on TPMs to make those distribution models sustainable.

● (1555)

[*Translation*]

That is why it is so important that we catch up to the rest of the world and ratify these WIPO treaties.

[*English*]

Bill C-11 would also create new exceptions that would give consumers greater flexibility in how they could use the media they had legally acquired, new exceptions for things such as format shifting, time shifting, and making backup copies. These are all long overdue additions to Canadian copyright law, but they should only apply so long as the TPM is not circumvented in order to make those new copies.

I understand that some have proposed to remove that condition and to allow the circumvention, or hacking, of TPMs in order to make those backup copies and those format-shifted copies, but allowing that hacking makes sense only if we go back to that digital locks mentality and do not think of these technologies as enablers of those distribution models I was talking about.

I'll give you some examples again. If I can circumvent that Spotify TPM, the thing that's protecting that stream, in order to make my own backup copies, again, I can just copy the entire Spotify music library legally under Bill C-11 and have my own local copy of the whole library they're offering as a subscription model.

Again, if I'm allowed to legally back up that Blockbuster rental, there's no reason I'd ever need to buy a movie. I could just rent movies and make as many backup copies as I wanted. That's why the TPM requirement in these new exceptions is absolutely vital: to ensure the viability of those new business models.

I want to say a couple of things about the enablement clause that I don't think have been raised today. There have been a lot of reports lately about what this clause is, so it's another concept I'm hoping I can clarify right now.

When the the Honourable Tony Clement introduced Bill C-32 a couple of years ago, he talked a lot about going after the bad actors or the wealth destroyers in the copyright world. Those were programs such as Napster and LimeWire, back in the day. Nowadays we have websites such as isoHunt and The Pirate Bay. These are the guys this enablement clause really targets.

On the other end of the spectrum, Bill C-11 also has safe harbours that are meant to protect the good guys. These are ISPs such as Rogers and Bell, or search engines, or hosting sites like YouTube. We know that these good-guy services are sometimes used to transmit infringing content, but it's not their primary purpose. That's why Bill C-11 gives them a safe harbour and protects them from liability.

You really have to think of it as a spectrum. Bill C-11 has the enablement clause to go after the bad guys and then safe harbours to protect the good guys.

However, the problem I want to bring to your attention today is that the bill won't really give enough teeth to copyright holders to go after these bad guys. On the one hand, the enablement clause is narrowly worded, so there's a chance that bad guys such as isoHunt and The Pirate Bay could argue their way out of it in court. On the other end of the spectrum, those safe harbours are very broadly worded. Not only could those bad actors argue their way out of the enablement clause, but they might actually be able to be sheltered under those safe harbours. That would be an unforeseen negative consequence of drafting the bill in its present form.

I can't stress enough the importance of getting the right language when it comes to the enablement clause and to the wording of those safe harbour provisions. It would be much too technical for me to get into all the little tweaks that might be needed today, but I'll give you an example.

The enablement clause right now applies to websites that are primarily designed to enable copyright infringement. That's the current language. However, every time we've seen these websites face lawsuits in other countries, their first argument was always, “Sure, 99% of the people who go to my website are downloading illegal content, and sure, I've made millions of dollars from all the infringement, but it was never my primary purpose. It was never what I primarily designed my website to do. It just so happens to be what it's used for nowadays.” That's why I propose to change the language of the enablement clause to say that websites primarily designed or operated to enable infringement should be liable for the massive amount of infringement that those bad actors are causing.

I urge the committee to look at these and some of the other proposed amendments that have been made to the enablement clause and those safe harbour provisions.

The last thing I'd like to quickly mention are certain technical amendments that are needed to some of the software-specific parts of the bill. These are provisions related to things such as encryption research, network security, reverse engineering, and software interoperability.

Last year at the Bill C-32 committee, witnesses such as the Honourable John Manley and the Honourable Perrin Beatty talked a bit about some of these amendments. I can confirm, both as a systems engineer and as a copyright lawyer, that these amendments are indeed required to those software-specific provisions. I haven't heard a whole lot of opposition to them, so I think they're fairly non-contentious. I'd urge the committee to consider those as well.

● (1600)

[*Translation*]

I think my time is up. So I would be happy to answer any questions you have on the bill.

[*English*]

The Chair: Congratulations to you as well, because you're under the 10 minutes, as was everyone else.

Before we start the questioning, I need to mention to the members that about five minutes before the end of this meeting today we'll quickly jump in camera to discuss a few items from the previous meeting that need to be discussed. It is my decision to jump in camera at the end to discuss these matters.

With that, we'll begin the first round of five minutes. I believe Mr. Armstrong will be starting the questioning.

Mr. Scott Armstrong (Cumberland—Colchester—Musquodoboit Valley, CPC): Thank you, Mr. Chair.

I want to thank you all for being here and for making your presentations. As you know, the bill is very technical. It's long and complicated. Your presentations have been able to make things very clear and concise. I'll ask probably all three of you to clarify some information, starting with Mr. Gannon, the most recent presenter.

You talked about changing the definition away from the term "digital locks", saying that we should change it more towards protection. You talked about the balance between the enabling part of the legislation and the safe harbour part of the legislation.

I just want you to clarify some points on the difference you elaborated on by saying that the enabling part may be too narrow and we need to expand it a little bit more to catch some of these intentional abusers of the system. On the other side is the safe harbours, where we may want to narrow it so that some of these bad actors can't try to abuse that.

Could you expand a bit on the relationship between those two clauses?

Mr. James Gannon: Sure. As I said, right now there are four safe harbours. There is one for network service providers, entities like ISPs. There is a caching exception for making cache copies. There is a hosting exception, if you're a hosting provider website like YouTube, and there's also a search engine exception.

Now, in two of the cases, I believe the network services exception and the search engine exception, it says that this exception does not apply if you're enabling infringement. Quite obviously, enabling infringement is what we consider to be the encouraging and inducing of a massive amount of copyright infringement. So it makes sense to say that we won't give you a safe harbour if you are inducing that amount of infringement.

The problem is that this condition, which says that you only get the safe harbour if you are not enabling infringement, only applies to two of the four safe harbours. So it's possible that you could be operating a hosting website and you might be saying, "Sure, Your Honour, I'm enabling copyright infringement, but the hosting exception in the Copyright Act now says that I'm shielded from any liability."

That's why part of my presentation said that the enablement is not worded strongly enough and sometimes the safe harbours are too broadly worded.

Mr. Scott Armstrong: Great. I appreciate that.

To Professor Trosow, in your discussion you said that the bulk of your research talks about your attempt to make Canada into sort of a haven for fair dealing. Could you just define the difference between fair dealing and what some people would term as "free dealing"?

Prof. Samuel Trosow: Yes. Fair dealing exists under the law in Canada and the U.S. and elsewhere. In Canada you have to first come within one of the statutory categories: research, private study, criticism, review, news reporting. But the second step you go through is this analysis that's very fact-dependent, that is based in Canada on the six criteria I've set out. You weigh all of those different factors and you make a determination as to whether the dealing is fair.

So the reason I would distinguish between fair dealing and free dealing is that it's not as if, when you meet the statutory requirement of being in one of the categories, you're done, and it's fair dealing, so copy as much as you like. You can't go to a photocopy machine and mass-produce textbooks as a substitute for purchasing them as you would if it were just a one-pronged test. By having those fairness criteria, it's clear that you still have to give a lot of thought as to whether what you're doing is fair.

I think the more we can do to make the public aware of those criteria, the better.

Mr. Scott Armstrong: You also stated that the United States has already implemented or updated their copyright legislation. Their publishing industry, particularly in the area of educational materials —I'm a former educator, so that's why I'm focusing on this—is more free-dealing, the way they have it structured, than what we have currently in Bill C-11. You say that has not negatively impacted their sales and they have done very well with the educational market, I guess one would say.

Really, then, the current legislation, as written in Bill C-11, should not pose any threat to the greater educational publishers in Canada?

● (1605)

Prof. Samuel Trosow: I don't think there's any credible evidence that it would do that. In the United States you have "such as"; it's open-ended. You don't have to fit in one of the criteria. It specifically says, "including multiple copies for classroom use". Then you go on to the analysis of the four factors, which are substantially similar to the six factors of CCH. The case law in the United States makes it very clear that you can't do massive copying that's destructive of the market, just like our last factor here.

So I think the worry that by including education you'll somehow undermine the publishing industry just flies in the face of the reality in a much larger market.

The Chair: Thank you, Mr. Trosow and Mr. Armstrong.

I'll hand it over now to Mr. Angus.

Mr. Charlie Angus (Timmins—James Bay, NDP): Thank you, gentlemen. It has been a fascinating discussion.

I'm going to have to be very short and quick because I only have five minutes, and there are so many issues we can discuss.

Mr. de Beer, Mr. Gannon helped to provide us with a pretty good example of the use of technological protection measures to break business markets—to steal products—and I think it's an issue that all parties are agreed on. We don't want new and emerging business markets to be sucked up by someone saying that they're going to rent a film and then deciding that rental means an extension: ownership. That's the difference between owning a product and renting a product.

Mr. de Beer, the question is whether or not we're setting up a two-tiered set of rights. If you have certain legal rights that can exist in the analog realm, such as, for example, to extract information for parody, for satire, for research, and that is under a technological protection measure—for example, in a DVD, and you're doing a film review—you can extract information in an analog realm but not in a digital realm.

You mentioned the issue of a constitutional challenge. Do you believe this two-tiered set of rights, if it goes unamended, will be problematic?

Prof. Jeremy de Beer: Yes. The issue of the non-technological neutrality of provisions that provide different consumer rights in an offline environment than are provided in an online environment is one of the criticisms you see. I'll just speak about some of the scholarship that my research team and I have reviewed, some of those 1,500 articles.

In those, the vast majority of scholars and researchers point that out as one of the criticisms; it's not the only criticism, but it's definitely one of them. That in itself is one of the factors in the constitutional analysis, but it's really a question of whether the government is going to enact a law that follows the traditional contours of what has conventionally been copyright, or whether it purports to regulate, in pith and substance, property and contracts. That's where the real danger of constitutional invalidity comes into play.

Mr. Charlie Angus: It would seem to me that the WIPO treaty talks about exceptions that are guaranteed already in the law: that you can bring those into the digital realm as long as you're not adding new exemptions or, in the case of Spotify, that you would, under the digital realm, be okay to just download the entire content and then cancel your subscription—that would be an overreach.

But within WIPO, many of our trading partners do have the protection for exemptions that are clear and clearly defined. Is that your understanding?

Prof. Jeremy de Beer: Yes, I think there's an important issue that we need to separate here. That's the issue of the use of technological protection measures in the marketplace and the use of copyright law to prohibit the circumvention of technological protection measures. Those are two very different things.

Currently, Canadian law is technologically neutral about the use of technological protection measures. It provides no provisions that either support or prohibit the use of these kinds of measures in the marketplace. That's why we have technological protection measures applied to all kinds of businesses, whether it's online streaming—audio or video—or whether it's e-books or DVDs: because there is no prohibition, and that, as far as I know, is not on the table for discussion here.

What we're talking about are legal protections or legal provisions that prohibit the circumvention of technological protection measures. So it's like an additional layer, and if you just imagine concentric rings of protection, we're talking about the outermost ring of protection here. That is one of the issues, or one of the potentially problematic points to raise or that may be raised in—

● (1610)

Mr. Charlie Angus: I have a very short time left, but because of your work with the Copyright Board.... We have had a real concern about clarifying the issue of education. Our concern is that the book market is much smaller in Canada, and it's much smaller in Quebec, so if something is affected, it does have ramifications.

Mr. Trosow suggested the CCH decision. That seems to be a really clear definition. It defines what education is. In your work with the Copyright Board, because that's where it's adjudicated—these issues are fought over again and again to really clarify exactly what's fair and what's not—does it help to have a clear definition like the six steps of CCH? How would the Copyright Board look at new legislation and how would they ensure that the issue of fair dealing does not mean open season but also means that it respects the principles that have been defined?

The Chair: Within 30 seconds, please.

Prof. Jeremy de Beer: Very briefly, I have to emphasize that I cannot speak on behalf of the Copyright Board. I'm a former legal counsel; that was before I became a professor. But in my time as the former legal counsel to the Copyright Board, adjudicating precisely these kinds of issues was precisely what the board did. Then, oftentimes, it would go to the Federal Court of Appeal or the Supreme Court of Canada.

In fact, there is a case before the Supreme Court of Canada right now that is part of a series of cases where these types of questions are being dealt with. I have no worries at all that the board and the courts are incapable of dealing with these issues as matters of interpretation. I think that adding the factors considered for fairness' sake—

The Chair: Thank you, Mr. de Beer. Thank you, Mr. Angus.

We now go to Mr. Braid, for five minutes.

Mr. Peter Braid (Kitchener—Waterloo, CPC): Thank you very much, Mr. Chair. Thank you to our three witnesses for being here this afternoon. We've had three excellent presentations.

Mr. Gannon, I would like to start with some questions for you, if I could, please, sir. As you were coming to your 10 minutes, you spoke about the need for us to consider some technical amendments concerning areas dealing with security and encryption research, etc. Could you start by elaborating on that?

Mr. James Gannon: Sure. As I said, right now Bill C-11 contains four exceptions that relate to software-specific or computer-related things—such as encryption research, security, interoperability, and the fourth one....

Mr. Peter Braid: It's in the bill. It's okay.

Mr. James Gannon: It's in the bill.

The way these are worded—I'm looking at them now. If I compare these to their international precedents in countries like Australia and Singapore, they did pass similar exceptions. They have proven to be sometimes beneficial to allow for some innovative technologies to be developed to allow some uses of computer programs and some kind of incidental copying in order to do things like encryption research and network security and those kinds of things. Their exceptions are much narrower than the way they are currently defined in Bill C-11. Currently in Bill C-11 they are defined with almost no qualification, whereas in jurisdictions like Australia and Singapore, the exceptions are limited to, as an example, making sure the person who is using this, who is cracking software and encryption for the purpose of doing this kind of research, is in fact trained and qualified and has the appropriate skill or education to make these kinds of things...that we are not just legalizing computer hacking, as it would be.

Another condition that seems quite reasonable to me is, if you are going to hack into someone's security network or you are going to hack into someone's computer program in order to do these kinds of research and for other beneficial purposes, you would at least make a good-faith attempt to notify the person and try to obtain the person's permission prior to hacking into their network. Those are internationally recognized preconditions to some of those software-specific provisions.

Again, I'm happy to provide you with a more detailed list of them. That's what I would recommend.

Mr. Peter Braid: Thank you.

In a nutshell, you're suggesting we look at limiting and tightening up the language in that section of this report?

Mr. James Gannon: Yes, that's correct.

Mr. Peter Braid: Thank you.

Concerning technological protection measures, TPNs, I have a very direct question. Do you believe they help foster and reward innovation when they are used in a business model?

Mr. James Gannon: Yes, absolutely. We've seen a lot of these business models and we've seen evidence of that from the countries that have adopted them. With respect to the examples I gave during my presentation, I don't think it's a coincidence that none of those services was developed in Canada. We've seen rapid adoption of things like the Apple iTunes store, which does limit the way you buy videos. It does limit it to five devices. Again, I don't think it's a digital lock to say, "I'm going to let you buy a movie and put it on five devices—but it's five, not 10,000." People have accepted that model. It's a known restriction. The marketplace has spoken and has been happy to adopt it.

● (1615)

Mr. Peter Braid: I want to try to bridge something here. Professor de Beer, in his presentation, spoke about examples of anti-circumvention language. The examples were from New Zealand and Switzerland.

Mr. Gannon, are you aware of those examples at all? Can you comment on that suggestion?

Mr. James Gannon: Sure. Not to say that there's anything wrong about Professor de Beer's research, but on the first instance, New Zealand was not a signatory to the WIPO treaties, so maybe that's not the correct model to look at.

Mr. Peter Braid: That sounds fairly relevant.

Mr. James Gannon: On the second instance, it's true that Switzerland does allow circumvention for those exceptions. Switzerland is also known as a country that has perhaps one of the largest private copying and tariff regimes. A lot of that unauthorized copying, circumvention, and creating new copies is actually compensated for in some fairly heavy levies they have on things like digital media and other things.

Mr. Peter Braid: Thanks.

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

Mr. Peter Braid: Professor Trosow, you spoke very passionately about the importance of ensuring that the notion of fair dealing isn't applied only to Canadians studying at educational institutions. Could you elaborate on that?

Prof. Samuel Trosow: Yes. We have general fair dealing, and then we have very, very specific exemptions for libraries, archives, museums, and educational institutions. I think it would be a huge policy mistake to mix the two and say we're going to create a definition under fair dealing, but then limit it to particular types of institutions. The educational process is much broader than what could go on within an institution. I do think the divisions between what goes on inside and outside of institutions are starting to crumble a bit.

The Chair: Thank you, Mr. Trosow and Mr. Braid.

We'll go now to Mr. Regan, for five minutes.

Hon. Geoff Regan (Halifax West, Lib.): Thank you very much, Mr. Chairman.

At the outset, it strikes me that when we talk about the WIPO treaties, one of the challenges we face is coming up with legislation that takes those into account but also respects the fact that they're 15 years old or more. The world has changed quite a bit since then.

Professor Trosow, in your view, would the kind of copying of Spotify that Mr. Gannon talked about be in fact the mass copying that's destructive of the market and be caught by that provision, that test?

Prof. Samuel Trosow: By the fair dealing?

Hon. Geoff Regan: Yes.

Prof. Samuel Trosow: Mass copying that is not related to any of the categories in the act would not pass the fairness test the way it's been enforced by the Copyright Board and the courts. The Copyright Board has been pretty adamant that they'll only tolerate a certain level of copying before that last factor is violated.

Now, we have other factors, but it would be hard to imagine that happening. I think a court or a copyright board doing a full fair dealing analysis would take into account all of the circumstances.

Hon. Geoff Regan: In the case that was described, what would happen?

Prof. Samuel Trosow: Well, I think it would be very likely that the fair dealing defence would fail.

Hon. Geoff Regan: The defence would fail—

Prof. Samuel Trosow: Yes.

Hon. Geoff Regan: —and therefore it would be not a lawful purpose, basically, or it wouldn't be fair dealing and therefore the person would be infringing copyright.

Prof. Samuel Trosow: It would depend on so many factors.

Hon. Geoff Regan: Sure.

Prof. Samuel Trosow: Generally speaking, though, I think that's what could happen.

Hon. Geoff Regan: Okay.

Prof. Samuel Trosow: That's if I understand this Spotify example.

Hon. Geoff Regan: Thank you.

Professor de Beer, you talked about the constitutionality of the bill, the technological protection measures provisions, in relation to the possibility of an intrusion on section 92 responsibilities or jurisdiction of the provinces.

I'm wondering what you think about the suggestion Dalhousie law professor Graham Reynolds has made, for instance, that:

> If the bill is passed in its current form, users, consumers, follow-on creators, and future innovators can effectively be prevented from exercising their rights... through the application of a digital lock.... Such an amendment risks impoverishing the values underlying the constitutionally protected right to freedom of expression....

What is your view on that constitutional issue?

Prof. Jeremy de Beer: That's an excellent point, actually. It's a separate constitutional issue the extent to which any copyright reforms may affect the right to freedom of expression.

Numerous Canadian academics have published on this subject, and I would recommend that the committee take their advice seriously. I'm thinking particularly of the work of Professor Carys Craig at Osgoode Hall Law School, the work of Professor Reynolds at Dalhousie, and the work of Jane Bailey, my colleague at the University of Ottawa.

These are all very relevant concerns. Without more specific context, I'd be reluctant to give you a legal opinion, or even an opinion in general, about whether or not this is a worry. But I can say that in my review of the extensive literature on technological protection measures, this is one of the most frequently cited concerns with strict anti-circumvention provisions: the potential to stifle free expression.

● (1620)

Hon. Geoff Regan: Professor, you mentioned that you've looked at the New Zealand and Switzerland models and that you'd be pleased to provide ideas or suggestions in terms of wording of amendments.

Prof. Jeremy de Beer: Yes.

Hon. Geoff Regan: I'd certainly appreciate it if you could do that for the committee.

Professor Geist, for instance, talked about a couple of ways to do this. He actually proposed to the committee last year that the first would involve amending the definition of “circumvention” to allow for lawful purpose...and account for only infringing purposes, pardon me. The alternative approach would be to add an explicit exception for circumvention for lawful purpose.

Which would you prefer?

Prof. Jeremy de Beer: If you look at the comparative analysis, the New Zealand legislation is substantially different from what's in Bill C-11 already. It repeatedly references links to technological protection measures that protect copyright, not public domain works, and circumvention for lawful purposes being legitimate. It also mandates a consumer right of access where technological protection measures apply.

The Swiss example is much simpler. It's a shorter provision that basically says none of the prohibitions against circumvention apply where the purpose is a lawful purpose. So it's much simpler. It would be easier to put into Bill C-11.

I like the New Zealand legislation a little bit better. I think it strikes a better balance between protection and competition.

There's a third option that I think is very important should this committee wish to consider it, and that's by elaborating in proposed section 41.21 where the Governor in Council has the power to make regulations. Currently this legislation goes beyond what's in the Digital Millennium Copyright Act in the United States, which has a triennial review process for allowing exceptions to permit circumvention. This bill just basically says the Governor in Council “may” do that.

So one of the things that at minimum this committee could do would be to mandate the Governor in Council to enact regulations providing the same kinds of exceptions as currently exist in U.S. law, as at least a starting point.

The Chair: Thank you, Mr. de Beer and Mr. Regan.

That ends the first round of five minutes of questioning. We'll move on to the second round and start with Mr. McColeman.

You have five minutes.

Mr. Phil McColeman (Brant, CPC): Thank you, Chair.

Again, thanks to the witnesses for being here.

I'm trying to get this into a language that perhaps the lay people of Canada can understand in terms of what this legislation is set out to do.

Mr. Gannon, I'll start with a question for you, because you talked about a kind of reframing of the context of this in people's minds, a reframing to more of what I would call an opportunity. The restrictions become viewed not so much as restrictions; they become what I would call reference points, which people could then use in a workable business model to move forward from that point.

I'm interested in exploring with you initially what you see coming, if you see anything at all. But what do you see coming down the road for businesses and people who would take those opportunities forward in regard to things that could be of benefit to the economy of this country? What are some of the things you're currently working with that you could see evolving down the road?

Mr. James Gannon: Actually, I don't think it's that much of a guessing game because, again, one of the advantages we have as a latecomer in ratifying these WIPO treaties is that we've seen the situation play out in other countries. The protection for TPMs was enacted in the United States in 1999, and the EU had their directive in 2001, so we've actually been able to see the results of this type of legislation.

What we have seen is the development of a lot of that economic activity, those sustainable business models, and people actually paying for music, which is something that we haven't had in Canada for quite a while. It's growing in all of these other countries.

We have these really quite incredible technologies that are being developed in order to have a thriving marketplace for things like digital movies and books, and digital video games and all of these platforms. They all rely on a protection, for technological protection measures, and they also rely on having a world standard for those, because if there's ever a weak link in there—and currently that weak link is Canada—that's going to be exploited everywhere in the world.

As we know, the world is flat right now, and because we don't ban right now—especially that ban on devices—Canada is known as a country where you can get chips to hack your video games from. You can develop the software comfortably in Canada, you won't be hassled, and then you can just disperse it over the Internet to all these other countries. A lot of these companies making these chips that allow you to hack video games and hack your programs offer free shipping to North America—and we know why that is.

● (1625)

Mr. Phil McColeman: So you're saying, with those comments, the sooner the better in terms of setting those new reference points through this legislation...? Is that correct?

Mr. James Gannon: Absolutely, yes.

Mr. Phil McColeman: To explore that a bit further in terms of striking the right balance, there has to be what I would consider, from my business reference points, a real core platform of flexibility in terms of being able to react down the road; in other words, that is, to say that this legislation has enough flexibility built into it to react as we go forward. Do you agree with that in terms of one of the platforms that we need to be considering?

Mr. James Gannon: Absolutely, and Professor de Beer touched on this as well. One of the really great things that I love about Bill C-11 and the TPM protections contained therein is the regulation-making power.

This is something that we haven't seen anywhere else in the world. It's probably one of the most flexible models we see, in that if there's a particular TPM that's really constraining economic activity, the bill lets the government officials and the Governor in Council enact a regulation that says, "All right, that particular TPM will not be protected, and we're allowed to circumvent that". Or even if there is a particular rights holder who is using TPMs in an anti-competitive way, or in a way that is restricting fair dealing, the regulations allow the government to compel that rights holder to remove that digital restriction or to allow people to make the circumvention of that technology.

It's very flexible, in that if the marketplace adapts in a certain way, the government can react as well and can pass regulations that will allow businesses to flourish instead.

Mr. Phil McColeman: Thank you for that.

The Chair: Mr. McColeman, you have about 30 seconds.

Mr. Phil McColeman: Perhaps I'll just finish off, then, with Professor Trosow.

You've mentioned detractors who say there will be abuse of the fair dealing provisions. Again, I've heard your reaction to that at the table here. Maybe underscoring what you said earlier, do you think there's any validity to that?

Prof. Samuel Trosow: I think you're always going to have situations where some people try to abuse the system, and some actors engage in industrial-strength infringement. But I think, for the most part, especially with what's going on in institutions like schools and libraries, people are going out of their way to be respectful of copyright practices. Perhaps they're being too cautious, and that's why they need a little bit of assurance. I don't think it's—

The Chair: Thank you, Mr. Trosow and Mr. McColeman. Sorry to interrupt.

Now we're going to Mr. Benskin, for five minutes.

Mr. Tyrone Benskin (Jeanne-Le Ber, NDP): Thank you.

My question is for Mr. De Beer, just following up on what Mr. Gannon was saying.

In terms of being latecomers in bringing Canada into WIPO, we have had the opportunity to see examples from other countries. You brought up New Zealand, and Switzerland in particular, which uses the private copy process.

Can you expand on that and maybe talk about whether or not you've seen any hindrance of economic activity due to the private copy regime?

Prof. Jeremy de Beer: There are two aspects that are important for divisions on technological protection measures. The first is to facilitate new business models and innovation, and the second is to, wherever possible, avoid any unintended consequences. Whichever solution Canada adopts, those should be the two overriding goals—to facilitate new business models and to avoid unintended consequences.

If you look at the empirical evidence from the United States, there has been a large variety of unintended consequences. There's no empirical evidence—although there is anecdotal evidence—to suggest that technological protection measures have facilitated business models. Notice that I say technological protection measures facilitate some business models, not anti-circumvention provisions. Those are two different issues.

So even though there is anecdotal evidence that technological protection measures have facilitated business models, there's no empirical evidence linking that to anti-circumvention provisions, nor DMCA-style anti-circumvention provisions.

If you look at what the Swiss have done, for example, they are a country renowned for being among the global leaders in science and technology innovation. The Swiss model facilitates new business and it facilitates innovation, while mitigating or limiting any unintended consequences that can arise. That's especially important for Canada, given that these treaties date back to 1996. If we're going to have a flexible approach, as Mr. McColeman said, then we're going to need to have that sort of space. I think the Swiss model does a really nice job at that.

The danger in relying on the Governor in Council's regulatory-making power is that it's inevitably reactionary and it's always in hindsight. There are a number of aspects of the current Copyright Act that say the Governor in Council has the permission to make regulations exempting technologies from the private copying levy, for example. But what we've seen is that there's a significant reluctance to engage that regulatory decision-making power. Even if it's possible, it's reactionary, and we won't realize that there's a problem until it's too late.

● (1630)

Mr. Tyrone Benskin: Thank you.

I can't remember specifically, but I think it was you who mentioned something about tying content to specific platforms. We've seen how disastrous that was way back when, when a certain company that created Beta machines tried to buy up content, literally, to convert it to Beta so that they had control over it.

Could you elaborate on that, as far as the dangers in this current climate of that type of work?

Prof. Jeremy de Beer: What we see in the literature is a lot of researchers pointing to evidence of anti-competitive or potentially anti-competitive conduct, and one of those is tied selling. It's the "razor and razor blade" model, where you have electronic or digital content that's tied to a particular platform or a particular kind of device.

If you use electronic books as an example, it's entirely possible, indeed it's common practice, for Apple to tie books designed for the iPad to their particular device. Amazon Kindle can do the same thing, and in theory and practice you could have the same thing with the Android platform—although that's a little bit of a different category, for reasons I can explain if you'd like.

If a company like Research in Motion is trying to encourage customers to switch their content from the Apple iPad to the RIM PlayBook, there's a significant challenge in doing that. It may be possible, but if it's possible, it's only because RIM has the permission of the content providers and the device manufacturers to do that—to create the interoperable system. It's not going to be possible if there's no general market cooperation. This is one example of the potential problems that can emerge if liability for circumvention is not tied to acts of copyright infringement.

Again, just to emphasize, if that change were made, if the Swiss model were adopted, illegal behaviour would still be illegal. It would only be permitted to circumvent technological protection measures for lawful purposes. Anything that's an act of copyright infringement would continue to be an act of copyright infringement, and rights holders would have additional remedies for that problem.

The Chair: Thank you, Mr. de Beer and Mr. Benskin.

Now to Mr. Moore, for five minutes.

Hon. Rob Moore (Fundy Royal, CPC): Thank you, Mr. Chair, and thank you to our witnesses.

Mr. Gannon, you spoke with a lot of enthusiasm about some of the new business models, the opportunities that could flow to Canada with a strong copyright regime in place. I noted with interest your taking issue with the term "digital lock" and preferring other terminology.

You mentioned Blockbuster. A lot of us have seen the traditional storefront closing, but you mentioned some new opportunities they're having with downloads. What do you see on the horizon that this framework would enable for Canadian businesses? Are there any other opportunities similar to the example you cited?

Mr. James Gannon: Without favouring one business over the other, what we have seen a lot of is a reluctance of content providers to provide their content to Canadian distribution. They know that if you're a movie studio, if you're a video game designer, as soon as that one unprotected copy gets released onto the Internet, it might as well be in everyone's hands.

I think content providers, quite reasonably, are really trying to protect the streams and the channels through which their content flows. That's why, when it comes to licensing that content in Canada, there's a reluctance because they know that the device they're flowing their content through might have the greatest protection in the world, but it's completely legal for it to be broken. Even if we make some of those proposed amendments to allow that circumvention for some private copying, you're still allowing that content to be unprotected, you're still allowing for that protection to be broken, and you're creating that unprotected content.

As you said, that's why it's impeding certain economic activity, because these content providers are not licensing their content for Canada, and that's why we're not seeing the same kind of range of services and digital distribution as we see in other countries, in Europe or in the United States. That kind of economic activity would be promoted by enacting the kinds of protections we have now.

● (1635)

Hon. Rob Moore: I have one follow-up question. On another matter, you were discussing the safe harbour. You identified what might commonly be seen as bad actors and then some that lots of us would see as just fine—and the importance to have a distinction. You mentioned, a bit nuanced, the primarily designed versus primarily operated distinction.

Is there a middle ground? You might not want to cite specific examples, but since you gave us examples of a bad operator and someone who wouldn't be described as such, is there a middle ground we have to be aware of? As Professor de Beer says, under the current model or under some new model, there's going to be litigation. Where is the battle line going to be drawn?

Mr. James Gannon: Absolutely, there is a right medium, which is why I urge the committee to really try to come up with that right language. An example of why this enabling clause is kind of weak is that last year, at the Bill C-32 committee, even the ISPs—these guys who would be sheltered under the safe harbour—came out and said, "You know that enabling clause? You might want to kind of beef it up a little." They are not the kind of people you'd think would be promoting that kind of amendment, but even they identified that as a necessary change.

When it comes to the safe harbours, there are some amendments you could make that wouldn't cover any of those traditional good guys, like the ISPs or the search engines, but would help in making the bad guys not sheltered under the provisions—specific things, such as if you know about an infringement, do something. If you are a hosting website and I point out that there's some infringement content, do something about it—I don't think any legitimate website would be opposed to that kind of requirement, that you take some action against infringing content once you know about it. That kind of requirement, which we have seen in similar legislation elsewhere in the world, is not found in the current safe harbours.

The Chair: You have 30 seconds.

Hon. Rob Moore: Professor de Beer, you mentioned the threat of litigation as being not a compelling reason to not proceed with new legislation. As someone who's been involved in the past with litigation, do you want to comment on why we shouldn't fear that?

Prof. Jeremy de Beer: I think the committee should try to come up with a predictable framework, not something that has a lot of inherent uncertainties. I don't think you should be overly worried or bullied into believing you can't do a particular thing with the legislation because it will have too much uncertainty or lead to too much litigation. In particular, I'm talking about the addition of the word "education" there. The courts will interpret that, no matter what this committee does.

The Chair: Great. Thank you very much, Mr. de Beer and Mr. Moore.

We're now on to Mr. Cash for five minutes.

Mr. Andrew Cash (Davenport, NDP): Thank you, Mr. Chair.

Thank you to our guests today.

It was an excellent presentation, and I think anyone watching this outside of this room will also have been educated for sure on these matters.

I want to just follow up on something Professor Trosow said about codifying a test for fair dealing, such as the Supreme Court Canada has set out.

Do you know, first of all, of other jurisdictions where fair dealing has been codified? If so, how has that played out?

Prof. Samuel Trosow: The best example that comes to mind is that of the United States. We have case law in the United States going back to the 19th century allowing fair use, as it's called there, as a defence, but it wasn't until the 1976 revision to the Copyright Act that they actually codified it. The feeling was that this was the common law that's developed. It makes sense to have the legislation harmonized with the actual common law as much as possible, just to create certainty in the minds of end-users and institutions who have to try to order their affairs to comply with fair use.

The four fair use factors you see in the United States are based on how, in 1976, Congress saw the state of the law. I think that would be very similar to doing what the court in CCH said. The court in CCH did not pull these six factors out of the sky. There was a very long analysis in the court of appeals decision in 2002, which looked at a lot of English case law and developed these six factors. Basically, the Supreme Court said it endorsed those six factors.

● (1640)

Mr. Andrew Cash: Can you just elaborate further and give us a sense of what we'd be missing if, for example, we didn't take that advice and codify that?

Prof. Samuel Trosow: It would still be the law. The courts in Canada and the Copyright Board have made it clear that they feel bound by the decision of the Supreme Court of Canada, and nobody seems to be suggesting that decision was wrong with respect to those six factors.

I think you have an opportunity to say you think that's right too. You don't have to do it—you would keep the current state of affairs—but if what you want is more certainty, then I think you would be missing an opportunity to provide that certainty by not importing that very clear and relatively uncontroversial language into the text of the act.

Mr. Andrew Cash: Those on the other side would suggest that adding a measure around anti-circumvention of technical protection and technical laws instills that level of certainty. You're suggesting that this is a much more certain measure.

Prof. Samuel Trosow: I think it's a much more certain measure. If you're worried about the litigation that will ensue, I think there's just as much of a worry about litigation that is going to ensue from the technological protection measures. We've seen all sorts of litigation in the United States around things like garage door openers and printer cartridges.

It's really been a hotbed of litigation since the DMCA. Look, you can't craft legislation that is going to be litigation-proof. The fact of the matter is that we live in a litigious society—fortunately not as litigious as the United States. I hope we can keep it that way.

Mr. Andrew Cash: Thank you.

Professor de Beer, you mentioned that aspects of Bill C-11 risk encroaching on provincial jurisdiction. I'm wondering if you could just flesh that out a little bit.

Prof. Jeremy de Beer: Yes. The basic issue is this: the federal government has jurisdiction over copyrights; the provinces have jurisdiction over things like contracts and property rights and devices.

As long as this legislation tracks the traditional contours of copyrights, there is not likely going to be a major problem. The problem is if this legislation does not link anti-circumvention liability to acts of copyright infringement, it goes beyond the traditional contours of copyrights. There is a risk that it will be invalidated constitutionally, and we would very likely see a challenge.

Just to elaborate on my earlier comment, I would suggest that the committee might want to decrease the likelihood of problems following a challenge. On the educational issues, you can decrease the likelihood of major problems by codifying these fairness factors.

On the anti-circumvention provisions, you can significantly decrease the likelihood of constitutional problems simply by linking liability for circumvention to copyright and copyright infringement.

Mr. Glenn Thibeault: You have 20 seconds.

Mr. Andrew Cash: Do you have anything more to add to that, Professor?

Voices: Oh, oh!

The Chair: That would be in 10 seconds now.

Prof. Jeremy de Beer: I would just reiterate that I have provided the committee with a volume of scholarly articles and research on this going back several years.

Mr. Andrew Cash: Thank you.

The Chair: Thank you, Mr. de Beer and Mr. Cash.

Next we have Mr. Calandra.

Mr. Paul Calandra (Oak Ridges—Markham, CPC): Thank you, Mr. Chair.

Mr. Gannon or Mr. de Beer, you both mentioned the Swiss model, but I'm not quite clear on what the Swiss model is or what we are talking about. I think you may have mentioned levies, Mr. Gannon. Are you able to expand a little further on what the Swiss model is and how that impacts consumers?

Mr. James Gannon: I probably have not studied it to the extent that Professor de Beer has for all his articles, but my understanding of it is that the Swiss, for technological protection measures, allow the TPMs to be circumvented for a private copying purpose.

Is that correct?

Prof. Jeremy de Beer: For any lawful purpose.

Mr. James Gannon: For any lawful purpose.

I would preface that first of all by saying that Switzerland...and I have read some articles that suggest that is not a WIPO-compliant model, and even some of the drafters of the WIPO treaties themselves have come out since then and said that Switzerland is not WIPO-compliant.

There's always the argument that we're far behind on this legislation. We are really the last in the developed world to come to this. Why would we look at the country—the other WIPO signatory—that's widely known as having the weakest protection when we're already coming from behind? Shouldn't we be trying to get ahead when it comes to protecting these new business models?

The other argument I made earlier is when you look at the Swiss copyright regime as a whole, Switzerland favours the use of tariffs on things like digital media and blank CDs and all those kinds of things much more than Canada currently does and much more than is the norm in the rest of the world. So I don't think that rights holders in Switzerland would be as concerned with all this uncompensated circumvention, uncompensated copying, when they're already getting revenues through these levies.

● (1645)

Mr. Paul Calandra: Not to interrupt you, but could you just explain a tariff?

Mr. James Gannon: A tariff, as was heavily debated in C-32, and maybe not so much at this committee yet, is when you impose an additional amount—I know the word “taxes” may be a bit controversial in that aspect—on retailers that would apply to things like blank CDs. Currently in Canada you pay a few cents on each blank CD and it goes toward the collective, and then that collective distributes that amount to artists, somewhat in proportion to what they think people are copying, whose music or movies they think are being copied, mostly just music right now in Canada.

As I said, in Switzerland they have a much stronger regime and they collect a lot more tariffs and a lot more levies, and that's why the rights holders might not be as concerned for all of this uncompensated copying, because they are being compensated through the levy system.

Mr. Paul Calandra: So iPods, iPads, phones, whatever the medium is, presumably. Sorry, you might not....

Mr. James Gannon: I was speaking about this earlier today to someone and the expression he used was everything but a toaster.

Mr. Paul Calandra: All right. That explains it.

Professor Trosow, at some of the consultations I've had, there has been a lot of discussion about our defining the word “education”, or narrowing the scope of what education is. You seem to be opening it up, or suggesting that education is much broader—senior citizens and so on. I wonder if you could expand on that.

The second thing I want to ask you is if you could identify some of the things that our educational institutions are doing right now to avoid infringing on copyright and if those measures can't be used after C-11, if C-11 is given approval.

Prof. Samuel Trosow: I think in the educational institutions that I'm familiar with in Canada there are a lot of measures in place to avoid copyright violations, some of which I think go well beyond what needs to be done.

There was discussion in some libraries of pulling reserve materials off the shelf of their required readings. There's nothing in the law that would require that. I know that some libraries will not even add certain videos to their collection that you can get in a local public library because of worries about public performance clearances.

For many years we had the access copyright licence sit side by side with fair dealing, and I've written about the fact that I think that fair dealing was often trumped by some of the payments in the licence where it wasn't necessary.

In other words, educational institutions have been excessively cautious, and I don't see that stopping by adding the word "education".

As to the first prong of your question, I think it would be unwise to try to further define the term "education", because "education" is a good term. It's a good term to use because it touches the information-seeking needs of so many different members of society. I wouldn't want to see that term narrowed. If a court has to construe a term that doesn't have a definition in the act, as the Supreme Court just had to do with the word "research", they will use common, plain meaning.

The Chair: Thank you, Mr. Trosow and Mr. Calandra.

Now we go to Monsieur Dionne Labelle for five minutes.

[*Translation*]

Mr. Pierre Dionne Labelle (Rivière-du-Nord, NDP): Thank you.

My question is for Mr. Gannon. It has to do with the business model he is proposing, one based on digital locks.

Briefly, I want to draw a parallel with the war on drugs, which had a big emphasis on repression. We were able to bust some big cartels, but in actual fact, the war is all but lost. Drug use is constantly on the rise in America, especially the U.S., where the prisons are full.

Your business model sets out penalties for those who break the digital locks. Would you not say that is an outdated model? We are moving towards cloud computing, now and in the future. Applications and games will be in the cloud and people will need computer access to use them.

To my mind, going down the digital lock road is like fighting a rearguard battle. What do you think?

● (1650)

Mr. James Gannon: I will answer in English, if I may.

Mr. Pierre Dionne Labelle: Go ahead.

[*English*]

Mr. James Gannon: I guess everyone heard the translation.

I think that kind of attitude that we can't stop this copying so why make it illegal—just because this copying is possible, therefore it should be allowed—is very much a defeatist attitude.

If you look at the kind of copying that's been done in the United States, for example, they've managed to build up these business models—they rely on these protections—and we've actually seen the tide turn around. We've seen the tide turn around recently in countries like France and South Korea. They've managed, through progressive legislative enactments that are similar to Bill C-11—but they have some different clauses in there—to turn the tide on uncompensated copying, illegal copying.

Right now we're seeing two things: on the one hand we're seeing a decrease in illegal downloads, but on the second hand we're seeing an increase in legal downloads and an increase in compensated copying and revenues flowing back to creators.

So I think it is a bit defeatist to put your hands up in the air and say there's nothing we can do about it, people are going to copy, as though it's somehow impossible for us to contain that illegal activity.

The examples we've seen around the world nowadays, especially the things coming out of France and South Korea, have shown otherwise.

[*Translation*]

Mr. Pierre Dionne Labelle: I wonder if that change in attitude actually has more to do with the use of iTunes, which makes works easier to access without resorting to piracy.

I have a question about fair education. This bill must enable us to ratify the WIPO treaty. Would a school teacher who was photocopying one or two full chapters of a textbook, for instance, be engaging in an activity that violated the spirit of the Berne Convention, making Canada an unacceptable signatory of the treaty? As I see it, not only does the use of such photocopies seem to betray the three fundamental principles of the Berne Convention, but it also seems to harm copyright holders.

Mr. Trosow, what are your thoughts?

[*English*]

Prof. Samuel Trosow: In terms of one or two chapters, I guess it depends on how many chapters are in the book, how long those chapters are, and how central those chapters are. If it's a ten- or twelve-chapter book that the instructor would not normally require the students to purchase, especially if the library has a copy or two in its collection, I think it's very reasonable to put those chapters on reserve.

It's very difficult in some courses to find the exact, precise textbook you want to use. As you go up the educational hierarchy, from first grade to twelfth grade to freshman, and all the way up to graduate school, it's harder and harder to find that one text book that fits, so instructors are often in a situation where they have to weave things together.

Fortunately, more and more things are available digitally, and this is where those huge library expenditures come in. The libraries are trying, as much as possible, to figure out what people need so as to minimize the need to even rely on fair dealing. So much more of the readings for a course could be pursuant to a licence, a broad site licence, that everybody in the university has access to.

I think the way out of this situation in the long run is to give our libraries better funding to empower them to do good collection development work, figure out what teachers need to give to their students, and purchase it. Fair dealing is there, though, for those situations around the edge, and sometimes you need to copy a chapter—one good chapter from a book—that you wouldn't otherwise ask the students to purchase.

The Chair: Thank you, Mr. Trosow and Mr. Dionne Labelle.

[*Translation*]

Your time is up.

[*English*]

For our last five minutes of this round, we have Mr. Lake.

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

Thank you to our witnesses. This is a great way to start these committee hearings. As I have been listening to you, I have found what you have to say very educational.

If I may, I want to start on the issue of TPMs. I thought Mr. Gannon and Mr. de Beer had some interesting comments.

In the last committee, I don't believe we saw something that both of you have alluded to, and that is the connection between levies and TPMs.

Mr. de Beer, you did it first when you were talking about this being inconsistent with other parts of the legislation. I think you said something to the effect that if you're charging for a levy, then circumvention ought to be allowed. I just quickly wrote down notes on that.

Then, Mr. Gannon, you were tying the idea of levies and the regime in Switzerland to the approach they took on TPMs.

Can either of you comment on this? Let's use the specific example of either an iPod or an iPad. What kind of levy might be assessed in Switzerland for them? In the brief time since the comments were initially made, I went online. I was trying to research it. It looks like there's quite a vigorous debate over this in Switzerland.

● (1655)

Prof. Jeremy de Beer: Yes, if you'll permit me to, I can reply. In general, these are not issues that are as closely related as you might believe.

In fact, in Europe in general, whether it's the European Union or Switzerland, there are many levies on many different devices and digital media. That's not linked to a particular model of anti-circumvention provisions. There is no link. That's not the reason Switzerland has the anti-circumvention provision they do: because there's a levy there. There are many levies throughout the European Union and they have completely different models of anti-circumvention. I have to emphasize that those are not related.

Now, I have published another article wherein I suggest that Canada should not be pursuing the path where we try to levy more media and more devices. This is a market issue and it's a market solution. What we need to talk about is how we can encourage innovation in the digital content market, right? That's fundamentally what it's about.

The question in that context is whether we want to look backwards at the digital business models of the last 25 years or at the digital business models of the next 25 years. There's a really dangerous way of thinking about it, which is that because some countries have enacted strong anti-circumvention provisions, we should do that, and that somehow strong provisions are better than more moderate provisions. That falls into the fallacy that because some protection is good, more is always and necessarily better.

That's really not the way to look at it. We absolutely want to create digital content innovation: innovative business models that facilitate the sale and marketing of digital content. There's a wide spectrum. Some people suggest that technological protection measures have no role to play in that kind of marketplace. I don't think we're seriously debating that now before this committee; we all realize that technological protection measures have a role to play.

The question is, are we going to provide legislation that protects those kinds of business models by protecting technological protection measures? I think everybody even agrees that the answer is yes, that we're going to do that, so the real question is, what kinds of provisions are we going to have? Are we going to have provisions like the United States has or are we going to have provisions like the Swiss have?

It's not an issue of whether there are levies or no levies. That's not it. It's really a question of whether we want business models for the next 25 years, or for the last 25 years, and how we manage risk—

Mr. Mike Lake: I'm just going to interrupt you because I know there's about a minute and a half left and I did want to go to Mr. Gannon to get a response to that.

Mr. Gannon, could you comment on Mr. de Beer's comments about how the TPM anti-circumvention provisions within the act impact the market in moving forward?

Mr. James Gannon: Sure. Again, I'd like to emphasize to the committee the importance of having that worldwide standard, whereby everyone is on the same level playing field when it comes to the protections. That's why we have a treaty that establishes a minimum standard.

As we said, the only two developed countries we've mentioned here that don't adhere to that standard are New Zealand and Switzerland. We have one country that hasn't even signed on to the treaty. We have another one that is a bit of a black sheep when it comes to the WIPO treaties, and it's seen as possibly controversial as to whether they even comply.

What we haven't mentioned is all the other countries out of the 80 countries that have signed on to the WIPO treaties, those countries that do have compliant and more robust standards. The question I would pose is, why aren't we looking at those 78? Why are we spending our time today on the two that are questionable as to whether they comply? We can adopt that worldwide standard when it comes to protection.

Mr. Mike Lake: That's perfect.

The Chair: You have about 20 seconds.

Mr. Mike Lake: In the last 20 seconds, what I'll do is thank you for taking the time to come before us today.

I will ask if we could get the analysts to do some research on the taxes or levies on iPods and iPads in Switzerland. I would be interested to know what those are.

The Chair: Thank you, Mr. Lake. We will ensure we get that from the analysts.

I would like to thank our witnesses. On behalf of the committee, thank you for coming and presenting today. It was very informative.

With that, we will suspend for—

● (1700)

Mr. Tyrone Benskin: Sorry, I have just a quick request, following on Mr. Lake's request. Mr. Gannon mentioned there are other countries we haven't spoken about. I think those two countries came up just because they came up, but maybe they can do a bit of research on a couple of the other countries.

Maybe you can suggest a couple countries that we could do a comparison of, in terms of alternate—

The Chair: Mr. Gannon, very briefly, could you suggest a couple other countries?

Mr. James Gannon: Yes. I brought my binders here today. They have the TPM laws from all across the world.

The Chair: That's brief. We'll take a look at them. Thank you.

We'll suspend for five minutes.

● (1700)

(Pause)

● (1705)

The Chair: We'll start our second round.

I'd like to welcome from the Alliance for Equality of Blind Canadians, Mr. Marc Workman, who is the national director. From the Canadian Association of Professional Image Creators, we have Mr. Cornellier. From the Canadian Photographers Coalition, we have Mr. Brian Boyle.

You each have 10 minutes to present, and I'd like to start with Mr. Workman.

The floor is yours.

Mr. Marc Workman (National Director, Alliance for Equality of Blind Canadians): Thank you, Mr. Chair.

I want to begin by thanking the committee, on behalf of the Alliance for Equality of Blind Canadians, for inviting us to appear. We very much appreciate the opportunity.

My name is Marc Workman. I am the national director with the AEBC. The Alliance for Equality of Blind Canadians is a national organization made up primarily of blind, deaf-blind, and partially-sighted individuals. We advocate on a wide variety of issues at the local, provincial, and national levels. If you want to learn more about us, you can visit our website at blindcanadians.ca.

Copyright legislation and its reform is of deep importance to blind Canadians. Access to printed material, much of which is protected by copyright, is one of the key barriers that prevents blind Canadians from fully participating in Canadian society. That said, if it were up to us, blindness would have nothing to do with this discussion. I would rather not be here today representing blind Canadians. I would rather not rely on an exemption that allows me, the people I ask, or the non-profits working for my benefit to create alternative format versions of inaccessible copyrighted works. Instead, I and other blind Canadians would prefer to borrow books from libraries, just like our sighted counterparts. We would prefer to purchase books from online and bricks-and-mortar bookstores, just like our sighted counterparts. In short, we want to be able to access copyrighted works, just like our sighted counterparts.

Unfortunately, blind Canadians cannot do this today. Less than 10%—and some would say less than 5%—of printed material is available in an accessible format. Those few accessible versions exist only because inaccessible materials are reproduced in an accessible form.

I want you to keep these points in mind as you listen to my recommendations. These recommended changes are necessary only because publishers and copyright holders are creating products that could be, but are not accessible to blind Canadians. Genuine access requires not an exemption, but a commitment on the part of copyright holders and publishers to make accessible products. To sum this up, we do not want to rely on an exemption; we have to rely on one. Because of that I urge you to make the exemption as effective as possible by adopting the recommendations I'll make during the rest of this presentation.

Recommendation one has to do with technological prevention measures, or TPMs. While we support the exemption in proposed section 41.16 of Bill C-11, which permits the circumvention of TPMs for the purpose of producing alternative format versions of copyrighted works, this right to circumvent TPMs for all practical intents and purposes will not be one that the average blind Canadian can exercise.

Breaking the digital lock on copyrighted works is almost certain to be beyond the means of the average blind Canadian. Not only is some level of technical expertise required, which many blind Canadians will not possess, but there is no guarantee that the circumvention tools themselves will be accessible, even to the most tech-savvy of blind Canadians.

Moreover, circumventing TPMs places a burden on those organizations that produce alternative formats for the benefit of blind Canadians, so these organizations will have to hire and maintain staff with the technical expertise to break the digital locks. Even though proposed subsection 41.16(2) of Bill C-11 also provides an exemption to those offering services or manufacturing products for the purpose of circumventing TPMs in order to produce alternative formats, that exemption is granted only to the extent that the services or tools do not unduly impair the technological protection measure. It's not clear exactly what it would mean to not unduly impair a TPM, and the ambiguity concerns us.

Given the general restrictions on circumventing TPMs, we believe it's unlikely that the necessary tools will be widely available and readily accessible to blind Canadians and the organizations working on their behalf. The AEBC recommends, along with many others—and we've heard discussion here today—that the restrictions on circumventing TPMs be tied to actions that would otherwise be violations of copyright. Not only is this balance better for Canadian society in general, but we believe it's the best way to ensure that blind Canadians have access to the tools necessary for them to access copyrighted works, for which they have a legal right to access.

● (1710)

Without this change, the right of blind Canadians to circumvent TPMs to produce alternative formats will almost certainly be a right that few of us can exercise.

Recommendation two has to do with the for-profit production of alternative format materials. Currently section 32 of the Copyright Act exempts only non-profits from having to obtain permission from the copyright holder in order to produce an accessible version of the copyrighted work. As I said, though, under this system, only a small fraction of copyrighted works are ever converted to an accessible format. There is, however, a growing industry of for-profit companies that are involved in the production of accessible formats. The AEBC recommends removing the limitation to non-profits in the exemptions in both the Copyright Act and Bill C-11. We believe this will lead to a significant increase in the availability of alternative format versions of copyrighted works.

Recommendation three has to do with sending alternative formats outside of Canada. The AEBC applauds the attempt to clarify our laws with respect to sending alternative formats outside of Canada. This brings us one step closer to realizing an international agreement that will increase the cross-border exchange of alternative formats. Importantly, this will significantly reduce the duplication of work that's taking place around the world, by which I mean different countries producing the same work in alternative formats.

However, in clause 37 of Bill C-11, proposed paragraphs 32.01(1)(a) and (b) limit the ability of organizations to send alternative formats to other countries. It's limited to those cases where the copyright holder is a Canadian citizen or is a citizen of the country to which the materials are being sent. This limitation places a burden on those organizations that would exchange alternative formats across borders. It forces them to have to establish citizenship before they can send an alternative format outside Canada, but also restricts the number of works that can possibly be exchanged.

The AEBC's recommendation is that the only restrictions be, one, whether the work was legally produced in Canada and could legally be produced in the country to which the work is being sent; and two, whether the work is already available in an accessible format in the country to which the work is being sent. We believe those two criteria should determine whether a work could be sent outside Canada. This would reduce the burden on organizations that send these works to other countries and would dramatically increase the number of works that could be sent.

Recommendation four has to do with large print. Subsection 32(2) of the Copyright Act limits the scope of the section 32 exemption by excluding the making of large-print books. This limitation harms print-disabled Canadians of all ages, but is particularly harmful to older Canadians. This will only become more of an issue as the population ages, and more and more Canadians experience sight loss and become reliant on large print. The AEBC recommends that this limitation be removed from the Copyright Act.

The fifth and final recommendation has to do with the adaptation of cinematographic works. Paragraph 32(1)(a) of the Copyright Act also limits the usefulness of the section 32 exemption by excluding the adaptation of cinematographic works to make them more accessible. We believe this limitation is partly responsible for the extremely limited availability of films that include descriptive video.

For those who don't know, descriptive video is an audio narration of the action that's taking place on screen, which enables blind people to better understand what is being communicated by the film.

The AEBC recommends that this limitation also be removed from the Copyright Act.

Lastly, similar limitations concerning large-print production and the adaptation of cinematographic works are contained in clause 37 of Bill C-11. This clause has to do with sending alternative formats outside of Canada. In proposed subsection 32.01(2), large-print materials and cinematographic works are excluded from the exemption. We believe this subsection should also be removed.

I suspect that my time has nearly run out, so I will end it there and take any questions afterwards.

Thank you.

● (1715)

The Chair: Great. Thank you very much, Mr. Workman.

Mr. Boyle and Mr. Cornellier, I believe you have a ten-minute presentation together. I'll leave it in your capable hands to start that presentation.

Mr. Brian Boyle (Co-President, National, Canadian Photographers Coalition): Thank you.

Good evening.

My name is Brian Boyle, and with me is my colleague, André Cornellier. We are both professional photographers.

The true joy of photography is that it can be enjoyed by millions of Canadians, but to do it professionally—like anything else—takes talent, years of training, experience, and financial investment.

We are here as co-chairs representing the Canadian Photographers Coalition. I would like to thank you for the opportunity to provide comment on Bill C-11, the Copyright Modernization Act. We would also like to thank the Government of Canada for introducing this bill, and to offer our support.

Our coalition represents the interests of two professional associations: the Professional Photographers of Canada, or PPOC, represented by myself; and the Canadian Association of Professional Image Creators, also know as CAPIC, represented by André Cornellier. Together, our groups represent over 15,000 professional photographers, over 95% of whom are small-business owners, operating and working in their own businesses across Canada.

These small-business men and women rely on the revenue they generate from their creations to support their families, hire people in their communities, and pay their bills. Bill C-11 corrects a longstanding inequity in Canada's copyright law. Specifically, subsections 13(2) and 10(2) of the current Copyright Act, reflect an outdated and discriminatory view of photography, and Bill C-11 rightly eliminates these from the act.

Currently, section 10(2) deems the owner of a negative to be the author of the photograph. Section 13(2) of the act deems the commissioner of a photograph, not the author, the owner of copyright for commissioned photographs. This provision contrasts sharply with all other works, including musical performances and literary pieces, of which ownership of first copyright rests with the author, even if the work is commissioned by someone else.

In virtually every other industrialized country, including the United Kingdom, France, the United States, and most recently Australia, photographers own the copyright in commissioned photographs, not the commissioner. In essence, Bill C-11 is simply updating our law to reflect international trends and economic realities.

It is worth noting that the last three previous copyright bills, specifically Bill C-32, Bill C-61, and Bill C-60, also proposed to repeal sections 13(2) and 10(2).

● (1720)

[*Translation*]

Mr. André Cornellier (Chair of the Copyright Committee, Canadian Association of Professional Image Creators): Good afternoon.

Before I begin, I would like to thank the committee for the opportunity to be here today and the government for including photographers in Bill C-11. That is a very important move, and we are grateful.

I notice that we are in an ideal room, since, right in front of me, I can see the following sentence:

[*English*]

“The spirit of the printed word”, and to show the spirit of the printed word there's an image. I guess an image is worth a thousand words.

[*Translation*]

In addition to awarding first ownership in copyright to the creators of photographs, Bill C-11 also proposes a new provision, section 32.2(1)(*f*), which provides individuals who commission photographs, for private or non-commercial uses, broad rights to reproduce these photographs.

We support allowing the commissioner and their family reasonable usage of photographs commissioned for private purposes, particularly in social media.

However, we are very concerned that Bill C-11 does not define non-commercial purposes. We believe this omission will significantly harm small business photographers' ability to earn a living and generate economic growth.

Without defining non-commercial purposes, it allows some unintended reproduction of commissioned photographs that could have financial implications for photographers. This fundamentally alters what should be a balanced approach between the rights of users and the rights of photographers to earn a living. The heart of this imbalance is that users may choose to reproduce the commissioned photographs for purposes that to the user are non-commercial but that have significant commercial implications for the photographer. In these cases, the term "non-commercial" has very different meanings to the artist and the commissioner.

● (1725)

[*English*]

Let's give you an example.

Look at the back cover of your brochure for a second. A photographer is commissioned to photograph a landscape of Port aux Basques in Newfoundland. Under the bill, the commissioner is permitted to reproduce this photograph for private and non-commercial purposes. Mailing a copy to his son, hanging a copy on his cottage wall, or giving a copy to his grandmother who grew up in Port aux Basques—these activities would not have a substantial financial impact on the photographer.

However, if that photograph were to be reproduced several hundred times, it would have serious commercial consequences for the photographer, even though it might be a non-commercial practice for the commissioner. It would affect the photographer's future earnings, because he would not be able to sell similar photographs of the same landscape. All the photographer's potential customers would already have a free copy of the photograph.

[*Translation*]

To correct this imbalance and in order to clarify what is meant by non-commercial, we have presented a small, technical amendment that reflects the spirit of Bill C-11. In fact, it is drawn from clause 29.21(1) of the bill, called “Non-commercial User-generated Content”, which Bill C-11 seeks to add to the legislation. The wording of our amendment is on page 2 of the backgrounder that you have before you.

This amendment allows for the broad use of commissioned photographs. It also limits only those uses that would have a substantial financial impact on photographers. It sets parameters to ensure non-commercial practices, as perceived by the commissioner, do not have substantial commercial implications on photographers.

However, this amendment supports the desire of the government and consumers to have fair access to their commissioned photographs. We do not believe our amendment alters the intent of the provision; it simply helps provide some clarity to non-commercial uses.

[*English*]

Mr. Boyle.

Mr. Brian Boyle: In summary, even with our amendment, Bill C-11 awards much broader usage rights for commissioned photographs than for any other copyrighted creation in Canada. Our technical amendment will protect against cases where unlimited usage rights are causing significant financial harm to men and women in small businesses. In other words, with our amendment, Bill C-11 creates a balance between a consumer's ability to use copyrighted work, and a creator's right to earn a living.

Thank you.

The Chair: Thank you, Mr. Boyle and Monsieur Cornellier.

Now we will start the first round. We're going to begin with Mr. Armstrong.

Mr. Scott Armstrong: Thank you for coming and for making your presentation. It's great to have representatives of the photographic industry here to talk about this bill.

I know that some of the changes proposed in this bill are things that photographers across Canada have long been asking for, so it must be great to be here to talk about some of the positive changes.

Can you elaborate on how the previous legislation limited the ability of photographers to make a living?

Mr. André Cornellier: Basically the law, which said that in a commissioned work the copyright was given, by default, to the person who commissioned the work and not to the photographer, comes from 1920. That is something that we have been trying to change for many years.

In fact, nearly every other industrialized country in the world changed this in the 1950s or 1960s. Canada is the only one that has made no change so far. Australia changed it in 1999, but Canada is still standing its ground. So we appreciate that the government is doing this. For us, it's amazing. At least we're now going to be the same as the photographers in other countries. This new act will give, by default, the copyright to the photographer.

● (1730)

Mr. Scott Armstrong: It not only aligns us with other countries in terms of photography, it also aligns photographers as artists with the way we treat music producers and other producers of content across the country, does it not?

Mr. André Cornellier: Exactly, and it does that on top of making us the same as other photographers in the world. In Canada, we were the only exception. Writers, musicians, and painters all got copyright, and the only exception was photographers.

Mr. Scott Armstrong: Right. That was a decision made in 1920, and it's great that we're rectifying that in Canada with this legislation.

Mr. André Cornellier: It's great.

Mr. Scott Armstrong: Mr. Workman, I'm going to move on to you.

I'm a former educator, and my school had a great number of visually impaired students. Descriptive video is something I'm very interested in and something I've become aware of in the last few years. How will this legislation impact the spread of descriptive video? You talked about making amendments in that area.

Mr. Marc Workman: I think there's an opportunity to remove the limitation that exists in the current Copyright Act. Right now, the way Bill C-11 is written, that opportunity isn't being taken advantage of. You have to obtain permission every time you want to convert an inaccessible film into an accessible one by adding descriptive video, so I think the issue here is one of lost opportunity.

Mr. Scott Armstrong: If we were going to use descriptive video for education, do you believe the education exemption would apply to this use in schools and other educational settings?

Mr. Marc Workman: I'm not entirely sure. It's specifically excluded from the section 32 exemption, so that suggests they didn't want there to be an exemption for this purpose. But I couldn't say if it could be covered under education.

Mr. Scott Armstrong: You talked about being able to transfer alternative formats over international boundaries. Are there other countries that have passed legislation, so that they're allowed to trade and move alternative formats that have been made for visually impaired people across international boundaries?

Mr. Marc Workman: Right now and over the last number of years, WIPO has been working on a treaty to do this very thing, to facilitate the cross-border exchange of alternative formats. It's great that we're bringing our laws into a format where we can sign on to a treaty like that. I would like to see the laws become as open as possible, so that we can exchange as much as possible and not be restricted in what we can do by our laws.

I'll leave it there.

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

Mr. Scott Armstrong: Thank you, Mr. Workman.

I'll go back to the photographers for the final 30 seconds.

Assuming that your association across Canada is very much in support of the changes in the bill, you talked about the amendment you're looking to put in. Can you expand on why you want to put that amendment in the legislation?

Mr. André Cornellier: Yes, but it would be difficult in 10 seconds.

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

We now go to Mr. Cash for five minutes.

Mr. Andrew Cash: Thank you, Mr. Chair.

Thank you to all three of you for being here.

Before I became a politician, I spent many years as a composer, songwriter, and musician, and I know how deeply frustrating it is for creators to lose that primary ownership of their work, so I want to speak to that very clearly.

That being said, I wanted to speak first to Mr. Workman, and hopefully if I have enough time I'll get back to you folks.

Mr. Workman, maybe you could give us a sense of what it means to people with perceptual disabilities to not be able to access not just printed material, obviously, but cinematographic works without descriptive video. Can you give us a sense of what that's like for folks?

● (1735)

Mr. Marc Workman: On a more emotional level, when you talk to older people who have lost their sight, the two things they constantly say they miss the most are driving and being able to read. So not having access to printed material is definitely something that people feel when they lose their vision.

I also want to mention that I'm working on a PhD at the University of Alberta, and as a student, I've seen a lot of students change their programs because they can get access to the materials in a certain program and they can't get it for the program they were originally in. They drop out of school, or they take longer to finish. It has a major impact on a blind person's ability to be educated and to get a job afterwards. We have really abysmal employment rates for blind Canadians.

Mr. Andrew Cash: So it would be fair to say this is an issue of equity.

Mr. Marc Workman: Yes, I would absolutely say that.

To put it very bluntly, we have people here producing products that are not accessible, but could be accessible without causing undue hardship. We're being asked to rely on an exemption rather than these products simply becoming more accessible. What I'm pushing for is to make this exemption, on which we're being forced to rely, as open as possible and as effective as possible.

Mr. Andrew Cash: Based on your experiences so far, do you have faith that the content producers will, perhaps, begin to open up their access for blind people and people with hearing impairments? Do you have faith that the private sector—or the market, if you will—will actually come in and respond to this?

Mr. Marc Workman: There is some evidence. If you look at Apple, iBooks is totally accessible using the iPod touch, iPads, and these sorts of things. But then if you also look at Amazon, the Kindle is completely inaccessible. They've taken steps backwards. The Kindle Fire, which recently came out, did not include any accessibility, so I'm not really that optimistic.

We're going to need either publishing incentives—subsidies to publishers who produce accessible formats—or some other kind of legislation to require it to happen.

Mr. Andrew Cash: What would be some of the ramifications—maybe you could just map them out in a general way—if this exemption were to hold? In other words, if amendments weren't made to Bill C-11 to reflect some of the concerns you have, how would that affect your community and other communities in the real world?

Mr. Marc Workman: It would just perpetuate some of the problems I talked about earlier—the education issues, in particular, which I'm more familiar with, but also the inability to fully participate in your community, to learn, or to engage in lifelong learning, if you end up losing your vision. I think we'd be left with the same situation we have now, which is an extremely small number of works being converted to accessible formats.

Mr. Andrew Cash: You do, however, suggest there is a business case to be made for for-profit companies to produce works in alternative formats. You say this does exist.

Mr. Marc Workman: Yes, there are a number of companies that are engaged in this business. However, they can't take advantage of the section 32 exemption, because it's explicitly limited to non-profits. It's another situation where we're trying to break down some of the limitations that prevent the exemption from being used as effectively as it could be.

Mr. Andrew Cash: So in other words—

The Chair: Mr. Cash, you had about three seconds, so unfortunately, I really couldn't let you go much further than that.

Mr. Andrew Cash: Thank you.

The Chair: Thank you, Mr. Workman and Mr. Cash.

Next, for five minutes, is Mr. Braid.

Mr. Peter Braid: Thank you, Mr. Chair.

Thank you to all our witnesses for being here this afternoon.

Mr. Workman, I'm actually going to continue the same theme of questioning that Mr. Cash started. I wanted to start by asking you to educate the committee a little bit and explain today what tools and technologies exist to create accessible formats.

Mr. Marc Workman: This is not my area of expertise, but typical alternative formats would be Braille and audio. They're some of the ones that might be more understood. More recently, in the last 20 years or so, e-text has been, potentially, a really revolutionary alternative format. There are screen readers. I'm using one on this Mac right now to access the text I wrote for my presentation. We can access electronic books using these technologies.

The issue occurs when DRM is put on e-books. For Kindle, or in the NOOK store from Barnes & Noble, DRM can limit the ability of screen readers to access the materials, so we become locked out of a potentially accessible book.

● (1740)

Mr. Peter Braid: But Bill C-11 would allow that to occur, correct?

Mr. Marc Workman: Yes. Bill C-11 would allow us to remove the DRM.

The issue that I raise is that I suspect it will be difficult to find access to those tools. It's not clear that the tools will be accessible, so I believe it will be a right that can't easily be exercised by the average blind Canadian.

Mr. Peter Braid: I'm just trying to get to the root of understanding why currently only about 10% of works, as you explain, are in an accessible format. Is it an issue of business models? Is it an issue of technology?

Mr. Marc Workman: I think the organizations doing the work are not being funded in the way that they could be, and publishers are not supporting the production of alternative formats in the way that they could be.

We're talking about a fairly small market, and it's just not receiving the attention it deserves.

Mr. Peter Braid: Is it fair to say that not-for-profit agencies in Canada that support those with perceptual abilities and have some expertise in this area have concerns about improving this point?

Mr. Marc Workman: I would say so. I looked at the submission of the CNIB on Bill C-32, which you guys will have access to I'm sure. They raised some of the same issues about TPMs and maintaining a staff with that expertise, the ability to remove digital locks, and the concern with not unduly impairing the technological protection measure. So I think they have some of the same concerns.

Mr. Peter Braid: Thank you.

Mr. Boyle and Mr. Cornellier, you have stated this afternoon that Bill C-11 provides for the photographer to be the original owner of the copyright. This is a very significant development. It sounds like photographers have been waiting for it for decades in this country.

Mr. Brian Boyle: Yes.

Mr. Peter Braid: We talked a lot today about the aspects of Bill C-11 that contribute to business models. Could you elaborate on how this would contribute to the business model for a photographer, for a small business owner?

Mr. André Cornellier: At this point, any person who commissions the work owns the copyright. For me to have my copyright I have to negotiate it back. Before I start a job I sometimes have to go to a big corporation and ask them to give back my copyright so I can sell it to them. You can understand that there's a little difficulty there. If we have the copyright upfront, it's easier in advertising or in the corporate world to negotiate a fair fee for our work. This is of major importance for our business.

Mr. Peter Braid: Very good.

You've proposed a specific amendment, and I appreciate the very specific language you have included here.

You talked a little earlier about the importance of definitions, but the amendment doesn't seem to contain definitions. When does use become unlimited, and when do adverse effects become substantial?

The Chair: Answer in 20 seconds or less, please.

Mr. André Cornellier: Basically, the new amendment says that a person can use the commissioned work as he wants, and he can give permission to anybody to do the same.

That will go on and on. A person can produce 100 copies and give it to 100 people, and those 100 people can give them to another 100 people. There's an unlimited effect there. That is not what the government wanted. It wanted to give the person the possibility to email it, put it on Facebook, and use social media.

Let's say you give the permission to your grandmother. You send an email to your grandmother with a picture, and she then has permission to send it to the grandfather.

● (1745)

The Chair: I'm sorry, we're well over the time.

Mr. André Cornellier: I'm sorry.

The Chair: I have to end it there.

The last round of questioning, and the first round for five minutes goes to Mr. Regan.

Hon. Geoff Regan: Thank you, Mr. Chair, and thank you to the witnesses for coming today.

Mr. Workman, it seems to me that the provision you talked about gives people with disabilities the right to circumvent digital locks, but they're basically saying you can remove the lock as long as you don't take it off. Is that your sense of what the government is doing here?

Mr. Marc Workman: I can't say for sure. We're concerned about what this means, and we want to better understand. I think there are concerns that you have to take the lock off and put it back on, or do something like that, which may be technically very difficult.

Hon. Geoff Regan: Taking it off is one step, but you've already described how difficult that is. I guess you're saying you can only imagine—perhaps you'll agree—how difficult it would then be to put it back on, if you were able to take it off to begin with.

Mr. Marc Workman: Yes, absolutely. Then you have to worry about not unduly impairing the TPM, assuming you can take it off in the first place. You have to take it off in the right way, basically.

Hon. Geoff Regan: What impact do you see this having on a regular person with perceptual disabilities?

Mr. Marc Workman: I really doubt that the tools are going to be out there for the average blind Canadian to use. I think it may be possible for a very few elite blind Canadians to do it, but it isn't even clear that these tools will be accessible for any blind Canadian. We may not be able to exercise the right at all.

Hon. Geoff Regan: Thank you very much.

In relation to this issue of sending material that has been adapted outside of Canada, can you explain why it's necessary? Let's say you had something that was created in Mexico and you wanted to transfer it from Canada to Australia. Why is it necessary to be able to do that rather than being concerned about things that are created among citizens in Canada and so forth?

Give me an understanding of how that would practically work, and what the issue is.

Mr. Marc Workman: The issue I was pointing to is that a Canadian organization could create a book in an accessible format whose author or copyright holder is an American. We could not then exchange that with someone in Australia.

I think that's an issue. It's going to limit the number of books that could be sent to Australia and potentially they will match the same restrictions. Then someone from Australia couldn't create a book whose copyright holder is a citizen of the U.K. and send that Canada.

In general, I think it limits the sharing of alternative formats across borders.

Hon. Geoff Regan: Thank you.

Mr. Boyle and Mr. Cornellier, you provided us with this very nice book. It's a softcover book with some photographs by fabulous photographers from across Canada who are clearly following in the footsteps of Alfred Stieglitz, Henri Cartier-Bresson, and many other great photographers. They are capturing the decisive moment.

In this book there are images of priceless beauty. They have a market value, as you've stated, and you pointed out that the market value was important to photographers to be able to make a living.

I'm pleased to support those provisions in this bill. I also think the amendment you suggested is one that is not only worthy of support, but I'm going to be surprised if my colleagues on the government side don't end up agreeing to it. I think it is in keeping with the general intent here, and I hope I find that to be true in due course.

Is there any comment on that?

Mr. André Cornellier: I could not agree more with you. Obviously that amendment is not only for us, it's for both sides. Then both sides know what they can and cannot do.

At this point in time the word "non-commercial" has no definition. If you look, there's not one definition anywhere of that term. There are many situations where the user will say it's not commercial for them, and the photographer will say it is commercial for them.

If they end up in front of a judge, the judge won't be able to say, because both can be right. The funny thing about non-commercial is that both parties can be right and have opposite thinking.

How does a judge make a decision? He doesn't have any criteria. We're trying to put the criteria there, so that people can say, "This is how far non-commercial goes." It basically helps both parties know where, or where not, to cross the line.

● (1750)

The Chair: Sorry, Mr. Cornellier and Mr. Regan, we're over time. Thank you.

That ends the first round of five-minute questions. We will start the second round.

I believe starting us off for five minutes is Mr. McColeman.

Mr. Phil McColeman: Thank you, Chair.

Thank you, gentlemen for being here.

I'm interested in maybe allowing you some time to finish off your responses to my colleagues. You didn't get a chance to adequately or fulsomely talk about where the definitions end and where they begin. Is it 50 copies, or 50 Facebook postings? Did you have a sense of that when you were proposing this amendment?

Mr. André Cornellier: We have the sense that there's not just one response to that. It's not one, or 10, or 20, or 30; it's a case-by-case scenario. We cannot put in the law that you are allowed 10 copies and after that you stop. Sometimes a photograph copied one time would be a problem. Sometimes a person could make a reproduction of 50, and it wouldn't be a problem. Each case has to be defined by itself.

That's why the wording might not seem very clear, but it is for us. First of all, that wording comes from Bill C-11, from another part of Bill C-11, where they tried to define "non-commercial" for purposes other than photography. Somebody has thought about that and defined the term "non-commercial". We found out that it applies very much to us. In the example we gave earlier, if somebody asked me to do a photograph of a landscape and he gave it to everybody in the village, it's not commercial for him—he doesn't make any money—but for me it removes all possibility of sending it out.

Napster was exactly like that. Napster was a place that was non-commercial. There was no money there. You would put your stuff on the web and somebody else would pick it up. It was an exchange, but there was no exchange of money. Nobody was making money out of it, but they were removing the possibility for any singer to make money. The same example applies to us. The bill was made for people to access their photograph, put it on the web, put it on the social network, and email it. We have no problem with that, but at some point such a practice could damage my business. Let's give an example. You ask me to do a photo for you, and I do your portrait. You give it to your mother, and she puts it in the dining room, or whatever.

Mr. Phil McColeman: The bathroom.

Mr. André Cornellier: Well, I wouldn't say that, but....

Voices: Oh, oh!

Mr. André Cornellier: You're working for Hydro-Québec or a law firm and they give you a promotion, and they say they would like to tell people about you becoming a vice-president. They want a photograph, so you give him the photograph you gave your mother. The gentleman will say it was a non-commercial thing for him. He didn't make any money. He didn't sell it, rent it, or get one penny. It's true—it's non-commercial for him. For the photographer, normally the company would pay him for that kind of service, so it is a commercial thing for the photographer.

This is an example of when one photograph can be commercial and non-commercial at the same time. What do you do with that? We're saying that if it doesn't damage the business seriously, then you can do it. But if it damages a business in a big way, then there should be a limit. This has to be negotiated case by case.

● (1755)

Mr. Brian Boyle: We're talking about financial damage or credibility damage. If somebody copies a picture poorly on a Xerox machine and my name is right across the front of it, I'm not going to like seeing it up there, because lots of folks are going to see it and think I'm a terrible photographer. It's things like this.

The Chair: Sorry, Mr. McColeman.

Mr. Phil McColeman: Oh, my goodness.

The Chair: Time flies by.

Mr. Phil McColeman: That's one question.

The Chair: I've been lenient with some, but, sorry, Mr. McColeman, not right now.

Mr. Benskin.

Mr. Tyrone Benskin: Thank you.

Mr. Workman, there was something that was rather intriguing about the context you created for the situation. As a person coming from Quebec, I'm almost reading this as a language issue as opposed to a technological issue. I remember back in the days when Quebec was pushing to have American films available to the francophone population. They passed a law saying that you could not release a film unless there was a French version available. It seems to me that helping the blind community with either video description or e-readers would be almost a language issue as opposed to a technological one.

Would you comment on that, if I'm way off base?

Mr. Marc Workman: No, I would absolutely agree. I think we're talking about discrimination here. These products could be accessible.

I'm not saying that they could be in every case. A very small publisher who is releasing only a few hundred copies of a work is probably not going to be in a position to do multiple formats in Braille, audio, and other things like that.

But in a large majority of the cases, the products could be accessible, and without causing an undue hardship, which is the test for violating human rights. So yes, I think we're absolutely talking about a violation of human rights here.

Mr. Tyrone Benskin: Okay. Thank you.

So some sort of movement to have that type of material as part of the choice of languages in a video.... For example, you would have French, English, Portuguese, Spanish, and descriptive video as part of the original package itself, as opposed to you having to go elsewhere and have this done after the fact.

Mr. Marc Workman: Yes. In the Alliance for Equality of Blind Canadians, we always promote universal design—being able to access the same sorts of things in the same sorts of ways without needing special equipment or needing to go to a special service or organization. I think that's absolutely what we're looking for.

I don't expect that to come in the Copyright Act. I think it's a little beyond the scope of the Copyright Act. It would need to find its home in some other legislation, probably, but in the meantime, I think we can do some things to strengthen the exemption that we do have in the Copyright Act.

Mr. Tyrone Benskin: Thank you.

To Mr. Cornellier and Mr. Boyle, first off, I understand your position. It's ironic that the photographers are the last people to get this.

As artistic director of a theatre company, I have commissioned about four or five works, and I have always made it a point to make sure the rights were always left with the playwright, with a sort of limited amount of right of first refusal on my part from the company, and—

Mr. André Cornellier: Thank you.

Mr. Tyrone Benskin: —so I guess we're all struggling a bit with the concept of defining commercial use. As an actor, for example, I will get photos made. It's almost on an honour system, because I will go to my photographer, he will print those up, and I will use those and credit him. When I run out, I go to him and get more, and I pay him for that.

There are others who will take that photograph and get four or five copies, and then go to a photo repro place to get the low-quality cardboard things made and use those. The photographer doesn't get any money for that.

So with regard to defining commercial use—I know you've been trying to, and members of the committee have been trying to give you time to do that—I'm going to let you try again to add a little more definition to that question.

● (1800)

Mr. André Cornellier: Monsieur Thibeault...?

Mr. Tyrone Benskin: There, see...? More time to—

Mr. André Cornellier: Basically, I can give you another example of that. I think it's easier when we have examples.

For a blog, let's say there's a woman sitting in her kitchen blogging about a recipe. She takes one photograph and puts it on her blog. It won't affect my business. It won't kill me. There would be no problem there.

But if it's a company blog.... Obviously, if the blog is made by a company, they're basically there to make money. Suddenly, that blog becomes commercial for me.

So you can have a blog that's non-commercial and you can have a blog that's commercial.

Also, there's another aspect of blogs. Let's say that woman is putting the material out there as non-commercial. She has the rights and she can do it. But if she tells everybody—which the law permits her to do—to reproduce it, at one point the photo on her blog will be all over the place and people can reproduce it and give that permission to others. At that point, I cannot sell my picture anymore, because it's already there for free.

So where's the limit for that? That's how we're trying to spell out that limit, by saying that if it damages my business.... If you just use it once, or twice, or a few times, and you do it with respect, there will be no damage. But at one point, there could be enough damage to my business—like the Napster example I gave earlier—that I would lose half of my business.

The Chair: Thank you, Monsieur Cornellier.

Mr. Tyrone Benskin: Thank you.

The Chair: Thank you, Mr. Benskin.

Mr. Moore, for five minutes.

Hon. Rob Moore: Thank you, Mr. Chair, and thank you, gentlemen, for appearing here today and for your testimony.

I was pretty proud. I was looking through here, and I saw that my cousin, John Beesley, is one of the photographers who's featured in your book, so that really got my attention. Now I have to hang on your every word.

I know John, like 95% of your members, is a small business person, and small business is something we care very much about. We want to ensure that we reduce the frustrations that small businesses have. We spoke a bit about the unique challenges that photographers face in Canada when it comes to protecting their work.

Can you describe to us some of the frustration now before this bill gets passed, and how you see life for the photographer and the customer after the bill gets passed. We all value the work photographers do, whether it's wedding or graduation photographs. Photographs and good photographers capture the most important times in our lives. I know we certainly hear about it when we feel it wasn't a good photograph, but likewise when it's a great photograph, it's something we cherish.

To each of you, from a customer's perspective of these small business people, how are things going to be different after the bill passes?

Mr. André Cornellier: From a customer's point of view, at this point there are two ways. Either they own the work when they commission it, or there's a contract that negotiates how it's going to work.

With the new law, we're approving the fact that the customer can use it for private use. Private use is never a problem. Private use is never commercial. Private is within the families, within a certain... and we have no problem with private at all. I don't see a place where it would cause a problem. Within your family, within a few friends, it doesn't affect my business that much. It's the non-commercial part.

Most clients will use it in the private sector, let's say, and they will be pleased to do that, and we have no problem with that. It will help them to do that. It's clear in the law that it's possible for them to use it.

Our problem is more in the non-commercial sector where it could go commercial and non-commercial. Most people in their private life won't be affected by that. That's why we want to correct that for other people who will go into the non-commercial space—as I said, a lawyer who wants to be promoted—it's definitely for a commercial space. Promotion of a product, and promotion of a person, is commercial.

It will now very easily give the person the ability to use it in a private space. That's a given for them and we have no problem with that. We're good with that.

● (1805)

Mr. Brian Boyle: It also gives us the support of the law by providing photographers with first copyright in their works.

Hon. Rob Moore: Thank you.

How much time do I have, Mr. Chair?

The Chair: You have about a minute.

Hon. Rob Moore: One of the assumptions of what you're suggesting for a change is that for damages to have occurred the individual who is using the photograph maybe for another purpose, a broader purpose than was anticipated. In the example you gave for Mr. McColeman, the assumption was that they would have used the same photographer, otherwise there wouldn't be damages.

How do you reconcile some of the assumptions that would have to be made to draw that link for damage?

Mr. André Cornellier: As I said, it's going to have to be on a case-by-case basis. I think there's no broad way to define in the law exactly where the problem is. I gave one example of one photograph from a lawyer that goes to his company, and that's a problem. I gave another example where somebody prints 100 copies of a landscape and suddenly the whole village has it and I cannot sell a similar picture of that landscape to anybody.

I cannot ask a law to be perfect. I don't think any law is perfect. That's why laws are so long and have so many exceptions, and we're trying and trying again. I think photographers are not there to sue their clients. They want to have a good relationship with them, and most of the time they will lean toward the client. If the client does something that's iffy, he's going to let it pass. I don't think you will see 1,000 court cases against our clients.

The Chair: We're way over time, Monsieur Cornellier. Thank you.

We'll move on now to Monsieur Dionne Labelle *pour cinq minutes*.

[*Translation*]

Mr. Pierre Dionne Labelle: Thank you.

Mr. Workman, I listened to the amendments you proposed, and I have a question for you. I get the sense that this bill will make the community of people with visual perception problems feel even more excluded. They will feel even more disconnected from this technological and digital world we are living in. Am I wrong? Is that what you were saying?

[*English*]

Mr. Marc Workman: I'm suggesting we now have an opportunity to amend copyright, which we don't get all that often. At least, it hasn't been passed all that often.

What I'm suggesting is that we can fix some of the problems in the current Copyright Act, and we can enhance the things we're introducing. Sending the formats outside of Canada is something being introduced in Bill C-11, and I want to anticipate some of the limitations and try to get them out of the way. So I'm not sure if it's a sense of being more excluded, as much as it's a sense of having an opportunity to increase our inclusion into Canadian society and not taking that opportunity.

[*Translation*]

Mr. Pierre Dionne Labelle: Thank you.

I was very interested in the amendment put forward by he CPC. That is the kind of amendment that is completely admissible and should be quite appealing to our Conservative friends. The amendment concerns the whole notion of the market. The bill does not deal with that anywhere, and you introduced it quite nicely. As ardent defenders of the market economy, the Conservatives will be very pleased with the element you are introducing, and I think your amendment will have its intended effect. I commend you.

● (1810)

Mr. André Cornellier: Thank you.

[*English*]

We certainly hope so.

[*Translation*]

Mr. Pierre Nantel (Longueuil—Pierre-Boucher, NDP): Mr. Workman, my question has to do with the provisions on lock circumvention to address the specific situation of your members. Would you agree with me that the amendments necessary to give your community members the right to access the adapted formats they need are practically scraps? And yet, the bill could make it mandatory to provide the codes to circumvent the locks in order to make works accessible when specific circumstances warrant, such as those of your members. Would you prefer to see obligations of that nature in the bill, rather than an amendment that simply serves up scraps?

[*English*]

Mr. Marc Workman: I would agree with that. If there were something that could be included in the law to say that locks need to be removed by the publisher or the copyright holder in certain situations where the purpose is for producing an alternative format, then that would absolutely be a better solution. I'm not sure if that's within the scope of the Copyright Act. If it is, then absolutely, that's what we would like to see. The alternative would be to try to make these tools as available as possible, and one way to do that would be to make it so that they would not be illegal in 99% of the cases where they might be used.

[*Translation*]

Mr. Pierre Nantel: Thank you.

That is definitely an aspect we are interested in. Prior to your presentation, we heard people say that in Switzerland, for instance, regulations aimed at protecting digital works were much less stringent, but that they also made it possible to collect more royalties on various works.

We should not try to turn this bill into a cure-all. We have to recognize the dead ends it leads to and know when not to legislate out of necessity, so we can round out the legislation more effectively with regulations that fall outside the code.

So would you be more in favour of a change, an addition to the legislation?

[*English*]

The Chair: Make it quick, please.

Mr. Marc Workman: I would agree with that, if that's possible.

[*Translation*]

Mr. Pierre Nantel: Thank you.

[*English*]

The Chair: Thank you very much.

We're now to Mr. Calandra for five minutes.

Mr. Paul Calandra: Thank you.

I just wanted to go a little further on that than Mr. Workman did. As Mr. Nantel said, Switzerland has gone down the road of tariffs or taxes on the devices that people would be using where copyrighted material could be used. What impact would it have on people who require devices to pay a tariff? Who knows how much that tariff could be? We're going to go down the road of finding out what the tariff in Switzerland would be, but at what point does that become a difficulty for those who need the devices?

My second question is, would you be comfortable...? As you know, in this bill, through an order in council a TPM can be removed from certain items. Is it not an option, for instance, that through an order in council a TPM be removed from those programs used for people with visual disabilities?

I have those two questions for you.

Mr. Marc Workman: A large number of blind people do live in poverty. Any additional money that is required to accomplish an everyday task is going to be an issue. I think there are potential ways of getting around that through what they call assistive devices programs—programs funded by the government that can assist with the purchase of these essential tools. But absolutely, any time you add a cost to a group whose income is already lower than the average, it's going to be an issue.

With respect to using orders in council, I think that's an option. I think it might put a bit of the burden on the users to say we need them to do this, rather than from the outset saying that this is how we're going to shape it so that the burden isn't on the consumer.

I could see it working, but I'm a little reluctant because it does seem to place a bit more of a burden on the consumer.

● (1815)

Mr. Paul Calandra: Not to push too far on this, but it strikes me that if we consider the route of the Swiss model, we're then creating another level where people requiring certain things then have to approach the government for assistance through assistive devices, which would probably mean through the provincial government. I worry that by taxing these devices to the extreme in order to do what we can accomplish through regulation, we'd really be causing a great deal of difficulty for people.

I'll just leave that comment about adding such an enormous tax. One of the previous witnesses here said that he'd heard the Swiss tax everything but toasters. One of the first people I had the pleasure of working with at Rogers cable when I was a student was a gentleman who was visually impaired. What he was able to accomplish in 1995 on a computer at Rogers back then was truly amazing. He showed me some of the things he used at that time to help him overcome disability in his day-to-day life. I can only imagine that we've gone a lot further than that.

I just worry about taxing at every single opportunity to make life a touch easier for people, but thank you very much for your testimony.

I'll move on to Mr. Boyle and Mr. Cornellier.

You've outlined some of the difficulties that we have—that any government has had—in trying to create this type of legislation. For every one thing that we do, there are 10 other reasons why it might be a difficulty or a challenge to do it.

Mr. McColeman was mentioning to me a company in his riding that takes pictures and makes them look better, or makes them look like paintings—digitally. Who would own that? The person who fixes the digital? We always open up a lot of different things when we make one change.

You've highlighted some of the dilemmas, but on balance with what you see before you, is this a step forward for you?

I'm not predetermining what this committee will come up with in terms of amendments, but are you happy with what we've put forward, even in the absence of any further amendments?

Mr. André Cornellier: We are happy with a lot. Basically, we're going to open a bottle of champagne in a few months.

I mean, we just want to clarify a place where we know there will be some difficulty. It may seem like there are a lot of words, but we're trying to do it the simplest way possible in order to give leeway to both parties to do their thing. We want those people to use their photographs. We have no problem with that. What we're saying here is that it's not a red light. We don't want to stop people from doing things. It's just a yellow light. We're saying, "Do that, but don't go too far, guys. Don't kill us."

That's all we're trying to say.

The Chair: Thank you, Monsieur Cornellier. I'm sorry to have to stop you, but we do have to stick to the time frame here.

Up next is Mr. Benskin, for five minutes.

Mr. Tyrone Benskin: Thank you.

Mr. Workman, I want to clarify some of the issues you're bringing forward. From my perspective, I'm seeing the issue, as we talked about it before, as being basically a language issue and an accessibility issue, as opposed to a technology issue. Like every other patent that goes into any other software or hardware device, a patent is by extension a copyright, of which the patent holder is paid, which goes into the price. So it's not an extra tax or anything else that's being put into that patent for that machine.

As far as accessibility is concerned, perhaps you could reiterate whether the accessibility you're looking for is access to the material itself as opposed to issues with technology.

● (1820)

Mr. Marc Workman: Ultimately what we're looking for is access to the content, and that could be done in a few different ways. I suspect where it gets a little technological, though, is that DRM can often make it so that it's not possible to use some of the screen readers or some of the software that we would normally use to access text in, say, a Microsoft Word document, and that you can't use to read a book from Amazon's Kindle store, for example.

I think what needs to happen is that Amazon has to build in some accessibility. If they want to maintain that DRM, then they can build in a screen reader that will allow you to access it that way. Ultimately it is an issue of accessing the material.

Mr. Tyrone Benskin: So it's the software that you're looking to be possibly more cross-platform workable so that you can read documents, as well as e-books and even PDF documents, audibly?

Mr. Marc Workman: Yes, I think so. I mean, I think DRM causes some issues. There are different ways that could be worked around. Amazon could remove the DRM and provide the DRM file to an organization that then produces Braille and audio in an accessible e-text, or they could build in accessibility the way Apple has, for example. In the iBookstore, you can turn on voice-over on your iPad, and purchase books in the iBookstore and read them.

Mr. Tyrone Benskin: Okay.

Thank you.

The Chair: Great. Thank you, Mr. Benskin.

Mr. Lake, you have five minutes.

Mr. Mike Lake: Thank you.

Actually, that last comment was where I was going to start. You'd talked about Apple and iBooks being totally accessible, and I did want you to explain what you meant. Maybe you can elaborate a little more on that, if you could, just to educate us on how that works.

Mr. Marc Workman: Apple has built in a screen reader. Normally when you buy a PC, you will purchase or use an open-source screen reader that's made by a separate company. What Apple has done is they've put people on the development of screen readers within Apple. It's built right into the Mac or the iPhone or the iPad. When you turn on this screen reader, you have access to all of the applications that come with the iPad and many third party applications that you would download from the App Store. One of them is the iBookstore. You can do things like read by sentence, or by word, or by character, which is essential if you want to spell a name or take a bit more fine-grained reading approach.

So that's what Apple has done. They've built the screen reader directly into the product, and anyone can turn it on or off, as they wish.

Mr. Mike Lake: Could you conceivably identify an app and then open that app, let's say a newspaper app, and have the newspaper on screen read to you?

Mr. Marc Workman: Yes, you can do that. Where it gets tricky is that not all of the third-party apps—and it would be third-party apps that are creating the newspaper app, *The New York Times*, for example—implement all of the accessibility APIs, or application program interface protocols or rules, that Apple has set out. Not all of them work within them, so they can end up creating inaccessibility where, if they had just used the tools that Apple had given them to make an accessible app, there would have been accessibility.

Mr. Mike Lake: I have a 16-year-old son with autism, and in our world, our lives have been made immeasurably easier because there has been an explosion of technology and apps, particularly right now, that allow him to communicate. He doesn't talk, so he uses his iPhone to talk for him, because it has a little bit louder output than an iPod.

Before that, we had a $10,000 speech device that was about 15 times as big, and now he has an iPhone that does exactly the same thing for $189 for the Proloquo2go app, and the cost of the iPhone. Is there a similar advance in technology that would benefit blind Canadians?

Mr. Marc Workman: Yes, and it's happening with Apple.

You can spend $10 on an app that will identify your money, whereas before you would have spent $100 on a device, or had the device given to you by the Bank of Canada. It's the same thing as far as identifying colours, identifying objects, and scanning using OCR, so it's snapping a picture, performing optical character recognition, and then reading the text.

To do that, you would normally—and in previous cell phones—have to spend several thousand dollars. Now you can do it with a $10 app. The same thing has happened.

● (1825)

Mr. Mike Lake: It's pretty exciting stuff. I know it has changed our lives. I'm sure it has done the same for you.

Just to finish up with you on this, as I look down the list of the five concerns you raised, it seems to me that what you're saying is that, in most of these cases, the bill is an advance, but you think we could do even better. Is that an accurate portrayal of what you're saying?

Mr. Marc Workman: Yes. I think there are a couple of places where the bill does some good things, like sending things outside of Canada. We needed that in the bill so that we could join this international agreement. The exemption for circumventing TPMs, I don't think that's a bad exemption. I just think it's not going to be one we can exercise very easily without some other things in place.

The other three, though, are all aimed at the existing Copyright Act, and they're all aimed at trying to improve that. Where I see silence in BillC-11 is on those three issues of large print, cinematographic works, and for-profit production.

Mr. Mike Lake: I look forward to hearing from you in the future on how we can take a look at other opportunities to make your life easier. Certainly I think that, for all of us around the table, one of the things that makes our jobs so enjoyable is that opportunity.

Thank you for taking the time to come here.

The Chair: Thank you, Mr. Lake.

I will now thank our witnesses and our guests. We will suspend briefly to go in camera for committee business.

[*Proceedings continue in camera*]

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