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Chair

Mr. Glenn Thibeault

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● (0900)

[*English*]

The Chair (Mr. Glenn Thibeault (Sudbury, NDP)): Good morning, everyone.

Welcome to the eighth meeting of the Legislative Committee on Bill C-11.

I'd like to welcome our witnesses this morning, and guests, and of course members.

Our witnesses this morning, for the first half, are the Canadian Music Publishers Association, Catharine Saxberg; AVLA Audio-Video Licensing Agency Inc., Victoria Shepherd and Sundeep Chauhan; and from the

[*Translation*]

Société professionnelle des auteurs et des compositeurs du Québec, we also have Mario Chenart and Jean-Christian Céré.

[*English*]

Each of you have been briefed by our clerk that you have 10 minutes for opening statements. As Mr. Chenart would know, I'm very strict with time, so if you can't get it within 10 minutes, I will ask you to hold the comments to questions and answers.

We'll start off with the Canadian Music Publishers Association, for 10 minutes.

Ms. Catharine Saxberg (Executive Director, Canadian Music Publishers Association): Good morning.

Thank you, again, for inviting me to appear.

I've had the pleasure of discussing copyright issues with many of you over the past years, and for those of you with whom I haven't spoken yet, I look forward to hearing your thoughts.

[*Translation*]

My apologies to those following the written translation of my remarks. I have made some small revisions as a result of some recent submissions.

[*English*]

I'm the executive director for the Canadian Music Publishers Association. CMPA has been around since 1949. We are based in Toronto, although we represent music publishers and their songwriter partners from across the country.

Music publishers help songwriters make a living from songwriting. If a song gets used in any way that it generates revenue anywhere in the world, the publisher helps track down that money, collects it, and sends it to the songwriter. A publisher also invests in songwriters throughout their career, helping them stay afloat between royalties, and offering support and expertise.

We believe that the skill, talent, and expertise required to write a hit song are precious things, and are best nurtured by protecting the ability to make a living doing it, so it is important to have strong, effective copyright legislation.

CMPA joined over 100 organizations that have signed on to the cultural industry statement, and we continue to endorse all the positions put forward in that document. We believe in the need to modernize Canada's Copyright Act and to be good global partners. Copyright worldwide is only as strong as its weakest link. We also believe that the government has fallen short of its goals on copyright with Bill C-11, but we understand that the government believes that the proposed legislation does meet its policy objectives, so it's time for us to try to contribute to a new discussion.

The Chair: A point of order?

Mr. Mike Lake (Edmonton—Mill Woods—Beaumont, CPC): Could you maybe slow down just a little bit? Thanks.

Ms. Catharine Saxberg: Okay, sorry.

The Chair: It's because of the translators.

Ms. Catharine Saxberg: It's time for us to try to contribute to a new discussion. That is, can we make technical suggestions that will help to clarify or strengthen the government's stated intentions? We think so. We are proposing four main areas in which we believe the legislation can be strengthened with technical amendments.

The line between technical amendment and policy shift isn't always clear, so what we are trying to do today is add a positive, credible voice to this process, and we try to err on the side of caution and not creep into policy waters. I'm also pleased, if somewhat exhausted, to say that these positions represent many, many hours of debate within our organization.

Our four amendments relate to the broadcast mechanical tariff, ISP liability, secondary liability, and statutory damages.

Our first technical amendment is regarding the ephemeral recordings for radio broadcasters. When a song arrives at a radio station, a copy is made from the originating file to the radio station's hard drive. That copy is made under the right of reproduction for which creators and rights holders are compensated about $21 million annually. Our concern with Bill C-11 is that the elimination of subsection 30.9(6) of the act will cost music creators and rights holders millions by the de facto elimination of this revenue source. More than 47,000 individuals and companies receive cheques from this revenue stream annually from CMRRA alone—that's not counting SODRAC or the master owners or performers.

Under Bill C-11, the section that allows for this right would be repealed, thus allowing broadcasters to keep copies of their songs on their server for 30 days without payment, as long as the songs are deleted at the end of that 30-day period. In other words, the government wants to change the law to provide broadcasters with access to the songs for 30 days for free. If the broadcasters want to keep the songs after 30 days, then they would pay the existing tariff.

The problem is that as Bill C-11 is currently written, broadcasters believe they will be able to game the system by deleting a song file every 30 days, and then immediately restoring the exact same song file. In essence, broadcasters can easily comply with the 30-day destruction requirement by making those copies of copies.

Although the CAB doesn't say so in its written submission, we know it is the broadcasters' intention to game the system. In fact, recently broadcasters have suggested that it's a nuisance to have to delete and recopy libraries every 30 days, and that they want the tariff removed completely, rather than pay it. This would be a policy shift contrary to the government's intention. In effect, some broadcasters are complaining that the government is making it hard for them to work around the government's proposed law.

The broadcasters have framed the payment for this use as an inappropriate subsidy of the music industry. We see it as a use of our rights, rights protected under widely held principles of private property in a way that allows broadcasters to operate more efficiently. We are happy to contribute to these efficiencies by licensing this valuable right, and we think it's reasonable to be compensated for assisting them in streamlining their operations.

If there's a subsidy in this discussion, it's the other way around. Allowing Bill C-11 to stand unfixed would force us to subsidize the broadcasters by involuntarily contributing our right of reproduction for no compensation. Although CMPA would prefer that the government not eliminate subsection 30.9(6), we understand the government would like to confer a 30-day exemption from paying for this right. We reviewed the written submissions by the broadcasters and the government's proposal, and this 30-day exemption seems to be consistent with what the broadcasters have requested in their written submissions.

We can accept this compromise if we can ensure the integrity of the 30-day limitation. If a song is going to be kept as part of a permanent library, it has value for the broadcaster, value for which we should be compensated.

In order to give effect to the government's stated intention and limit the exception to 30 days, we have proposed a technical amendment that would prevent broadcasters from making reproductions, which, while technically retained for only 30 days, would end up being a permanent library of music. In other words, it would stop the broadcasters from getting around the exemption by using delete and restore.

If the government's intention is to eliminate the BMT by leaving the barn door open on this 30-day exemption, Bill C-11 would be in violation of the Berne Convention, which says that a government cannot repeal a right that is currently being monetized. There's also some additional amending language in our written submission in regard to temporary reproductions for technological purposes.

Our second technical amendment relates to the role of ISPs in reducing online piracy. The government has stated that one of the goals of this bill is to reduce online piracy, and this is a good goal. However, there's a need to improve the provisions for ISP liability in Bill C-11 in order to ensure that they will in fact achieve this goal.

ISPs take an active role in shaping the Internet traffic that flows through their systems. In fact, ISPs are aware of and regularly monitor how much traffic they carry and what transmissions are used for unauthorized transfer of files. The problem that rights holders face is that many of these sites are outside Canadian jurisdiction and therefore cannot be shut down at source. An example of this kind of site would be Pirate Bay. In the U.K., the high court ruled two weeks ago that Pirate Bay is an infringing site and injunctions for ISPs to block access will soon follow.

● (0905)

The kinds of amendments we are proposing are similar to what's being used against Pirate Bay in the U.K. Provisions like this are proving effective in other territories also.

The CMPA again has proposed amending language that would create a positive obligation for service providers to prevent the use of their services to infringe copyright by offshore sites. Should that wording not be acceptable to the committee, we have proposed a more limited version of the amending language, which would permit injunctions only for the purpose of requiring service providers to block access to the services that are primarily intended or ordinarily used for enabling acts of copyright infringement.

There also has been much talk lately, both in Canada and in the U. S., about American SOPA and PIPA legislation. If I were you, I would be asking me how these proposals compare to the controversial American proposals. I have an answer that has been submitted as part of an addendum that addresses this question. To summarize, our legal review assures us that the amendments we are proposing are far narrower than SOPA and PIPA and that they are in keeping with Canadian due process, more so than the American proposals.

Our third proposed technical amendment is for secondary liability for copyright infringement. Bill C-11 proposes eliminating liability for most Internet intermediaries by balancing provisions that would target so-called online enablers. Unfortunately, these provisions are drafted narrowly and ambiguously. For example, the provision is limited to services that are designed primarily for infringement, creating a loophole for those services that may have been intended for innocuous purposes but are now primarily intended or ordinarily used for copyright infringement.

Furthermore, it's unclear if computer software that enables acts of copyright infringement is equivalent to providing a service. Many of the factors proposed to distinguish between legitimate and illegitimate service providers are very unclear and may need to be litigated extensively before their scope is clearly understood. Again we are proposing amending language to rectify this situation: we would like to see “designed primarily” changed to “primarily intended or ordinarily used”.

Our fourth and last proposed technical amendment relates to statutory damages. In an attempt to achieve proportionality in statutory damages in Bill C-11, the government has created significant obstacles to copyright enforcement. In proposed subsection 38.1(1), the government has created two ranges for awarding statutory damages. Commercial purposes damages, for example, range from $500 to $20,000.

The simple reality is that copyright owners would be deprived of any effective response to non-commercial infringement, as the cost of collecting damages would so exceed the maximum recovery that no rights holders would be able to afford to enforce their rights. In addition, the meaning of “non-commercial” is unclear, with three different phrases being used to describe acts that are seen as worthy of reduced penalities or exemption from liability. The terms “own private use”, “private purposes”, and “non-commercial use” are similar in many instances and overlap in others, which is sure to lead to confusion and, consequently, to costly and unnecessary litigation.

In conclusion, as promised, the focus of my submission today has been on technical amendments that we believe will strengthen the bill within the confines of the government's policy choices. My members feel strongly, however, that I should go on record to say that our viewpoints on user-generated content, fair dealing, and private copying differ from the government's. They recognize, however, that these constitute policy differences and are therefore of lesser interest to the committee.

I shall do my best to answer any questions you might have.

Thank you.

● (0910)

The Chair: Thank you, Ms. Saxberg.

We're now moving on to the AVLA Audio-Video Licensing Agency Inc.

Ms. Victoria Shepherd (Executive Director, AVLA Audio-Video Licensing Agency Inc.): Thank you for the opportunity to appear before you today.

My name is Victoria Shepherd. I am here on behalf of the AVLA Audio-Video Licensing Agency, which represents over 1,000 members, including major and independent record companies and many independent artists, representing the vast majority of music played on radio stations in Canada.

I would like to express our enthusiastic support for this initiative to modernize Canada's copyright laws.

Creators and copyright owners need a clear legal framework that protects their work in today's digital marketplace. We applaud the government's effort to create new rules that will enable our members to sell and license their creative work.

I am here today to draw your attention to two issues regarding Bill C-11: first, a potential loophole in proposed amendments to the ephemeral recording exception; and second, recent requests by broadcasters for a major policy change on the ephemeral reproduction right.

In both cases, the end result would be contrary to the government's stated intention to provide a 30-day temporary exemption and could effectively annul the copying right.

Let me give you some background. For decades, radio stations played vinyl records and then CDs. Today, using digital technology, music is copied directly to hard drives. Radio stations have gained significant cost savings and higher profits thanks to the automation and operating efficiencies made possible by the right to make reproductions of sound recordings.

The point is that these rights have economic value. This is why broadcasters are required under the Copyright Act to compensate rights holders. It is also the basis for Copyright Board decisions in 2003 and then again in 2010. The board is an impartial, independent agency created by Parliament, which exhaustively considered expert testimony and the arguments of all stakeholders. It determined the fair and appropriate compensation to rights holders for the efficiencies broadcasters gain from utilizing the reproduction right.

No one during those hearings disputed that copies made by broadcasters have value.

The Copyright Board, in its 2003 decision, found that:

> Copying music to a hard drive optimizes the use of these new [broadcasting] techniques, thus entitling rights holders to a fair share of the efficiencies arising from this reproduction.

The 2010 decision found that using the reproduction right “allow [s] stations to increase their efficiency and profitability”.

Commercial radio in Canada has grown steadily and significantly more profitable in the past decade, reflecting, in good part, the increasing importance of the reproduction right to broadcasters. Let's keep in mind that we're talking about the key business input used by commercial radio: music.

Music, more than anything else, is what radio business is all about. Over 80% of commercial radio programming is music. The Copyright Board has confirmed that reproduction rights are distinct from other rights associated with broadcasters' use of music, namely, the right to play the music.

These are separate rights that are separately owned by composers, performers, and record labels, and apply to separate and distinct activities. No one has been asked to pay twice, as the broadcasters argue. The foundation of copyright law is that the owner of a right be compensated by those who use the right.

Last week you heard testimony about the so-called layering of rights. The Copyright Board heard this argument and rejected it.

In its 2010 decision, the Copyright Board considered all commercial radio tariffs in a single, consolidated hearing at the broadcasters' request. They determined what broadcasters must pay for different uses of music and the rights connected to those uses. It found that the effective payment for all uses—equal to 5.7% of revenues—is fair, equitable, and well within their means. Within this total amount, the board set the rates under each tariff.

In Bill C-11, the government has proposed a 30-day exemption to the ephemeral recording exception. In short, Bill C-11 says that broadcasters should not have to pay for temporary copies of music. While the proposed 30-day exemption was unwelcome news to our members, we respect the government's right to set the policy.

Last year, at the Bill C-32 committee hearings, the broadcasters supported the 30-day exemption. The representative of the Business Coalition for Balanced Copyright, appearing on behalf of the Canadian Association of Broadcasters said, and I quote:

> On the question of the ephemeral exception and the ability of radio stations to make copies, as the provisions now stand, the lifespan of those copies is 30 days. If radio stations want to make persistent copies of music to use as part of their operations, they can't now rely on the exception to do it.... This is simply short-term copying.

What we are most concerned about today is that the broadcasters appear to have much more in mind than a 30-day exemption. Last week you heard testimony that pointed to a potential loophole. Broadcasters apparently believe that Bill C-11, as drafted, allows radio stations to circumvent the proposed 30-day exemption by copying their music catalogue from one server to another every 30 days. Temporary copies will become permanent.

● (0915)

The original intent of the amendment is summarized on the Industry Canada website, and I quote:

> With the adoption of new technologies, broadcasters today make temporary copies of the music they play on the air.... Recognizing the temporary and specific nature of these copies, the Bill removes the requirement to pay for any copies retained for less than 30 days.

Now some broadcasters are going even further. They want to change the original intent so that the legislation removes the requirement to pay for any copies at all. The government has specifically stated that only technical changes will be made at this stage. Broadcasters are asking for a full-scale policy change that is a complete departure from the government's stated intent.

Temporary does not mean permanent. This applies equally to broadcasters' latest request for a policy change and to the potential loophole in the bill as currently worded. Both could have the same result—making the temporary permanent.

All stakeholders should be concerned that, as drafted, this bill will create legal uncertainty. To avoid this outcome, and to support the government's stated policy intention of a temporary exemption, the potential loophole must be closed. To that end, we propose a straightforward technical amendment that will align the provision with the government's intent. We will submit our proposal to the clerk. We must get this right. Please ensure that 30 days means 30 days and that temporary does not mean permanent.

We think the Government of Canada got its priorities right when it said in the very first line of Bill C-11:

> the Copyright Act is an important marketplace framework law and cultural policy instrument that, through clear, predictable and fair rules, supports creativity and innovation

We understand that this is a complex issue. We support the government in its effort to modernize the regulatory framework. We applaud the government's objectives to provide “clear, predictable and fair rules”. We believe our proposed amendment strengthens the legislation's ability to meet Bill C-11's stated objectives.

Thank you.

The Chair: Thank you, Ms. Shepherd.

● (0920)

[*Translation*]

We now move to the Société professionnelle des auteurs et des compositeurs du Québec.

Mr. Mario Chenart (President of the Board, Société professionnelle des auteurs et des compositeurs du Québec): Thank you, Mr. Chair.

Distinguished committee members, SPACQ thanks you for this invitation to take part in the work of updating the Copyright Act.

My name is Mario Chenart. I am a singer-songwriter and president of the board of SPACQ, the professional association that has represented the interests of Quebec and French-Canadian songwriters for more than 30 years. With me is Jean-Christian Céré, who is a lawyer and SPACQ's general manager.

I have been a songwriter since 1983, a career that has enabled me to criss-cross Canada from coast to coast. I have been active all over the francophonie; I have written for television and theatre and I have directed a number of gala events across the country.

Mr. Jean-Christian Céré (General Manager, Société professionnelle des auteurs et des compositeurs du Québec): SPACQ was founded in 1981 from a desire by artists to be able to practice their craft in dignity and prosperity and to find solutions to the challenges they faced in the management of reproduction rights, in modernizing copyright and in the status of the artist.

In matters of cultural policies and new technologies, SPACQ makes sure that those artists occupy a place of dignity in the great living legacy chain. Convinced as we are that we must act as one on these issues, SPACQ plays an active role in groups such as CAMI, the Canadian Conference of the Arts and the Coalition for Cultural Diversity. Our recommendations on the updating of the act coincide with the positions taken by all those groups. You can find a list of them attached to our brief.

Mr. Mario Chenart: We share the objective that you have set for yourselves, that of modernizing the Copyright Act. Though our humble submission certainly comes from the heart, it also comes from sober consideration.

Royalty payments are a source of independent income for creative artists. Like the values that the government espouses, we see them as a right, based on respect for private property and the simple principle of user pay, whether the user is an individual consumer, a business or an institution.

In addition, if the government wishes to stimulate the creation of wealth, why would it want to whittle away the sources of independent income for a sector that is going through a difficult time? For a flame to stay alight, you need a little air. Royalties are the oxygen our medium needs. Let us not make the mistake of taking our creative people for granted. Times being as they are, their concerns are critical. I myself have been a songwriter for almost 30 years. Since I started, our reality has changed considerably. With creative works becoming more and more virtual and online transactions becoming more and more frequent, the music and audiovisual industry is being shaken to its core. Amid all that shaking, songwriters are having to accumulate many many micro-royalties in order to make a living.

In that situation…

[*English*]

every penny counts.

[*Translation*]

So the law is silent about the revenues associated with private copying, with ephemeral recordings, with education, the revenues associated with the use of our music on the Internet, and that must be properly valued—as was done with peer-to-peer exchanges. All those revenues are our daily bread.

Clearly, people have never consumed so much music. It is consumed in cloud form, on iPods, on phones, on the radio, on television. It is everywhere. Consumers are ready to pay to receive it in the way they want.

Why not uphold and strengthen collective administration in this new ecosystem? Why abandon the private copy regime that allows people to copy their music while providing those who created it with compensation?

Since 1997, the regime has resulted in $30 million in revenue for rights holders. In a context where the business model is eroding, that amount makes a considerable difference. Though the ways in which our music is accessed and consumed may change, the principles remain and the challenge of applying them in the digital world rests on our shoulders.

Mr. Jean-Christian Céré: So we understand the government's initiative in wanting to accommodate consumers and providing them with the possibility of reproducing protected works for non-commercial purposes, the so-called “YouTube exception”. As it stands, Bill C-11 would make Canada the first country in the world where companies like YouTube would have the right to help themselves to and profit from protected works with no obligation to compensate the creators.

We also think that the exception would adversely affect their moral rights. As a result, we ask you to limit the scope of the exception and to let collective administration take care of issuing licences for that kind of use.

The Canadian government must also show leadership and courage by helping to stop the huge amount of lost income caused by illegal online transactions. As France has done by passing its Hadopi law, Canada must send a strong message that content cannot be illegally traded with complete impunity. Figures from the industry in France are going back up now. The government's action is bearing fruit. The French solution has the virtue of declaring loud and clear that copyright is a cornerstone of culture and that it must be valued and protected.

As to the notice-and-notice regime proposed by Bill C-11, this does nothing to dissuade persistent offenders. They will not put a stop to their illegal activities, knowing that they will incur no sanction from ISPs. The regime puts the responsibility for reporting and tracking down violators onto the shoulders of the rights holders. Rights holders have neither the ability nor the resources to police the Web. But ISPs, who are the main beneficiaries of this shift in values, have very significant resources with which they can combat piracy, educate consumers and compensate the music industry. So the balance that the government is seeking between the rights of artists and the needs of the users is still a long way off. Our brief proposes ways to measure and improve the effectiveness of the proposed regime.

● (0925)

Mr. Mario Chenart: The bill also include exceptions for education. That makes it impossible for me to refrain from asking the question: what favour are we doing for our educational institutions by removing the value from intellectual property? Do we ask a plumber or a computer expert to work for free when they are working for a school? So why do we ask an artist to do so?

International treaties to which Canada is a signatory stipulate that, if exceptions to exclusive rights are allowed, they must be "special cases which do not conflict with a normal exploitation of the work and do not prejudice the interests of the rights holder". In order to comply with that condition, the exceptions are generally accompanied by fair compensation. That is the case everywhere, but it will not be the case in Canada. So why the exceptions when agreements between management companies and educational institutions already exist? Those agreements were negotiated in good faith and they work, as Quebec's minister of culture, communications and the status of women recently indicated. So SPACQ supports SODRAC's proposed amendments. They clearly restrict the application of exceptions in the same way as they are addressed in the international treaties.

We are testifying today as Canadians, but also as citizens of the world. The companies that collectively administer our rights do so in reciprocity with sister companies around the world. The international treaties are the instruments by which our foreign partners are assured that their repertoires will be as well represented here as ours are there.

If it is true that works of art are the soul of a nation, our Leonard Cohens, Joni Mitchells, Gilles Vigneaults and Arcade Fires are spreading the Canadian soul to shine around the world in their work. They were recently to be found at the Grammy Awards, at the Oscars, at the Césars and at Cannes, as our composers also write music for the cinema. Those nominations underline the excellence of our artists and our expertise. Their work is universal and resonates all around the world. Work that travels like that is not a truck that drives the economy by burning our oil to carry its load of plastic. It is the soul of a people, its thoughts and its vision travelling through time to meet the world.

We do not lack the means here to make sure that our artists have the air that is vital for keeping the flame alight, healthy and bright. But do we have the will? What will it cost us? A little courage, a little vision? The creators are pinning their hopes on you. Show business and everything associated with it employs a lot of people, from creation to production, in the studios and in manufacturing, distribution, transportation, in retail or online sales, on radio and television. It is a huge machine set up to send the soul of Canada to the greatest possible number of people. Or is it just a pretext to print plastic, to put trucks on the road, to stack warehouses or to sell high-speed subscriptions? Is that what is driving all this upheaval?

We are at a crossroads. The decisions we make today will determine the fate of creative people for several years, for many years, if the frequency with which the legislation is reviewed is anything to go by. Distinguished committee members, we are counting on you to do what is necessary with this bill so that it respects the creators, serves the needs of the public and complies exactly with our international treaties. Putting the Berne Convention's three-step test right in the text of the bill itself would be a simple way to achieve that goal.

The Chair: Thank you, Mr. Chenart and Mr. Céré.

[*English*]

We will now go to the first round of questioning for five minutes. Starting us off will be Mr. Armstrong.

● (0930)

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

Thank you all for your presentations. There's not much time, so I'll try to go quickly. I'll start with Ms. Shepherd.

You discussed how the radio stations will not have to pay twice or charge you more. They've explained that to us. But artists do get remuneration from radio stations in other ways. Can you talk about ways that the radio stations reimburse artists?

Ms. Victoria Shepherd: What I can speak to is in the context of our ephemeral right and the performance tariff. I imagine that's what you're asking me about.

Mr. Scott Armstrong: Right.

Ms. Victoria Shepherd: Artists benefit from what we call a neighbouring right, which is the communication of the works over the air, so the performance, by radio stations. That's one way—for the activity of performing the music.

There's a second activity that the Copyright Board has deemed has its own value. That is the act of copying the music so it can go over the airwaves.

In the case of AVLA, we represent over 1,000 members, many of whom are actually self-produced artists. They are artists who own their own masters. If you are looking at someone like Randy Bachman, Hawksley Workman, or Metric, they get reimbursed as artists by virtue of the ephemeral right as well.

Mr. Scott Armstrong: Right.

We heard last week that the public performance royalty over the last ten years has gone up by 63%. Is that accurate?

Ms. Victoria Shepherd: Mr. Chauhan...?

Mr. Sundeep Chauhan (Legal Counsel, AVLA Audio-Video Licensing Agency Inc.): Yes.

In terms of the numbers, the rates have gone up over the last decade. That's been discussed in front of this panel before, but I could take you back a bit to the history of how that happened.

The reason for the increase goes back to the middle of the last decade, when the Copyright Board found that the rights that broadcasters were paying for were what they called "historically undervalued". So there was an adjustment in the rate at that time.

As you've heard previously in testimony, prior to 2003 the reproduction royalties obviously weren't paid at all. We've seen in the last decade the utilization of the separate and distinct reproduction right that was noted by the Copyright Board and has its own distinct value. We've also seen what I guess you would call a "market correction" for the historical undervaluation of the performance right as well.

Mr. Scott Armstrong: Right.

There's also ephemeral rights, which we heard have gone up by 483%. At the same time, the radio broadcasters have only seen a 41% increase in profits.

Where is this going to stop? Obviously you can't continue forever this type of profit and loss, compared to the radio stations.

Am I on the right track there?

Mr. Sundeep Chauhan: I'm not sure about those numbers and where the 483% comes from. When you go to the Copyright Board, a tariff is set, and that tariff is set for a set period of time. For example, the reproduction royalty was heard recently, in 2010, and that was the first time it had been heard since 2003—seven years prior.

In terms of the rates, when the Copyright Board sets rates, you have predictability and certainty as to what the rate is going to be for a set period of time. What the Copyright Board does is it undertakes an analysis of the particular industry that will be subject to the tariff and determines what is the most appropriate rate base for this particular industry.

In the case of the broadcast mechanical, what was discussed at the Copyright Board by all the parties was that a percentage of advertising revenue would be the most appropriate way to do the royalty calculation. In some cases, it's the square footage of an arena, and in some cases it's a flat rate. So that was determined as a percentage of the share of revenues.

What you have is a situation whereby when the industry is more successful in its use of intellectual property, the creators are rewarded equally as well. The numbers should go lockstep together.

I'm not sure how the number calculation was done, but I'm sure this honourable committee can do the research and dig the numbers right down to the level where you can see where that figure is coming from.

Mr. Scott Armstrong: Right. They were making the case, particularly the smaller radio stations, that they'll have trouble surviving if we make some changes on the other side. Again, we have to provide a balance in this bill.

I want to switch over to some of the international stuff. This legislation will bring us in line with the WIPO Internet treaties. Can you talk about how WIPO will affect Canadian musicians?

Ms. Victoria Shepherd: Well, I would like to address that specifically in terms of....

I'm here to talk about this 30-day potential loophole, so I can't speak with any level of expertise about the WIPO treaty and how that will affect the passage of the bill. What I can tell you is that in terms of the ephemeral exception, the government made it very clear that it was to be a 30-day temporary exception. We're asking today for a fix to make sure that the temporary doesn't become permanent.

● (0935)

The Chair: Thank you, Ms. Shepherd, Mr. Chauhan, and Mr. Armstrong.

We'll now move to Mr. Angus for five minutes.

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

Thank you for your excellent presentation.

It's been really interesting watching these hearings unfold, because we really see the Conservative game plan, which is to intervene and expropriate the rights of artists by creating this loophole.

We just saw my colleague complaining that the value of the mechanical royalties has gone up, when he hasn't put up any historical profile. In 1996, radio was in it tough, with a 1% profit rate. They were looking for help. They were looking for subsidies. The government decided to subsidize them on the backs of artists. But the industry was okay then.

And then, in the following 15 years, digital was great for radio. They got to get rid of all the staff who used to rack the records, all the people who used to have the CDs. So now their profits are massive. Year by year, their profits are going up.

This gets adjudicated at the Copyright Board, so the Copyright Board decides what's the value. We see this interventionist government here; they decide they're going to step into the breach. They're going to blame the artists, who.... You know, the industry has been bleeding for years. They're going to stop a payment that has already been adjudicated. But they legally can't do it.

Ms. Saxberg, we talked about the Berne Convention. You can't repeal a right internationally that's been monetized. Isn't that similar to expropriating a right that a business person has?

Ms. Catharine Saxberg: It is correct to say that under the Berne Convention you cannot take back a right that is currently being monetized. That's one of the things we're concerned about—the lack of clarity around the broadcast mechanical. In fact, what we would be doing is creating a de facto elimination of the right. That's of concern to us from a financial point of view, and we are also concerned about meeting our obligations under WIPO.

Mr. Charlie Angus: I think it's clear what's happening. We wondered about the 30-day exemption, whether it was a loophole they'd try to drive a vehicle through. Now we see that they're going to drive a fleet of trucks through it. Radio station after radio station has said, "Hell no, I'm not paying that; I'm just going to make copies every 29 days."

Then they came in and complained that this loophole the government created was a hassle. They didn't have to pay; they were just going to do this every 29 days and circumvent their obligation to pay. It's something that has been adjudicated under the Copyright Board, and they're crying on the shoulders of the Conservative Party saying, "Hey, do us a favour. Why don't you just erase that right altogether?"

Were you shocked when you heard the radio stations—big corporations—come in and say that they were not paying that mechanical, that they were just going to push the reset button every 29 days so they didn't have to pay it? You talked about gaming the system—it seems that it's a deliberate attempt to rip people off.

Ms. Catharine Saxberg: That's what it looks like. When we started looking at Bill C-11 and its predecessor, Bill C-32, we could see that there was a potential for this loophole, and we raised our concerns at that point. Upon reviewing the broadcasters' submissions, it looks like the broadcasters were—in writing anyway—saying that the 30-day exemption was what they wanted. We kept saying that, despite what they were saying in writing, we thought their true intention was to create a back-door loophole.

I was surprised a couple of weeks ago to see a broadcaster from Edmonton at a town hall meeting—held by a Conservative MP, actually—say that he didn't like this so-called "tax" on the transfer of CDs and that he was glad to see it was being repealed. It was going to be a big nuisance for him to have to make all of these copies. It was the first time that I had seen a broadcaster say out loud that this was what their intention was going to be: they were going to hit "control and delete" every 30 days.

Last week, after hearing testimony that this was in fact a problem, it seems that we've fallen down a rabbit hole. There has been a real shift in the broadcasters' game plan, which is contrary to what they asked for on Bill C-32 and is contrary to the intention of the government.

Mr. Charlie Angus: We hear the Conservatives talk about the right of payment—the copyright—as "tax". To hear them tell it, the poor companies are being forced to double dip. We're talking about $20 million in artists' royalties. They're saying it's going offshore when it's actually going to publishers. It's part of an international obligation, an international agreement. This is how the industry works.

What do you think about the possibility that the Conservatives don't understand it? Do you think that this attempt to create a copyright as a tax is misrepresenting what it really is?

● (0940)

Ms. Catharine Saxberg: It's certainly a misrepresentation to represent royalties as taxes, because taxes go to governments and royalties go to creators.

Mr. Charlie Angus: It's creators who benefit.

Ms. Catharine Saxberg: This nomenclature has existed through the entire discussion on copyright over the past couple of years, and it's both misleading and harmful.

The Chair: Thank you, Ms. Saxberg and Mr. Angus.

We're now moving to Mr. McColeman.

Mr. Phil McColeman (Brant, CPC): Thank you, witnesses, for being here today.

Mr. Chauhan, you mentioned the mechanical rights. I think we're talking about the $21 million payment to creators for those rights. You said that it's tied to a percentage of advertising revenue that the broadcasters receive as payment. That explains why the amount has increased substantially over the years.

Is that correct?

Mr. Sundeep Chauhan: Yes. According to the tariff, the rate is set as a percentage of advertising revenue. That is correct.

Mr. Phil McColeman: Now, we just had an ideological rant across the table about us and the way we think. We're supposed to be trying to pit creators against broadcasters, against consumers. I take offence at that. This is not a partisan issue. Rather, it's about trying to get the rights balanced. Instead, we get lambasted.

Let's try to speak some realities here. If it were tied to advertising income—and if the greedy broadcasters were making millions of dollars as has been described—would you not be benefiting from that?

The Chair: We have a point of order.

Mr. Charlie Angus: Yes.

When he refers to greedy broadcasters, those are his words. I don't think it's fair that he should use—

The Chair: That's more of a debate, Mr. Angus.

We have a point of order over here. Mr. Lake.

Mr. Mike Lake: Mr. Angus used the words "deliberate attempt to rip people off". I want to clarify—

The Chair: You know what, guys? We have clause-by-clause next week.

Mr. Charlie Angus: That is not a point of order.

The Chair: Neither were points of order.

Thank you very much. Please keep moving forward, Mr. McColeman.

Mr. Phil McColeman: I will.

I'll rephrase it. I apologize for using that word he took exception to. It was the deliberate—whatever it was—ripping people off. That's what it was. The broadcasters are ripping people off.

Are the creators not benefiting from an increased revenue if it is happening at a broadcast station?

Mr. Sundeep Chauhan: Yes. The exploitation and use of intellectual property plays a part in terms of generating increased revenues, allowing stations to better target the musical audience they want to reach, and to realize operational efficiencies to increase revenues as well. That benefit then gets passed on and is shared as well by the creators of copyright—

Mr. Phil McColeman: Shared with the creators. So the relationship right now is interdependent on each other. The more successful the broadcaster is, the more successful the creators are. Is that correct?

Mr. Sundeep Chauhan: Yes, that is correct.

Mr. Phil McColeman: I just don't want any misconceptions out there in the public realm about the fact that it is a symbiotic relationship that benefits both.

Mr. Sundeep Chauhan: Yes, absolutely.

Mr. Phil McColeman: It's mutually beneficial the way it currently stands. Of course, that's what we're trying to do here.

Mr. Sundeep Chauhan: Absolutely.

Mr. Phil McColeman: We're trying to strike the balance of keeping that as harmonious as possible through this legislation.

Again, it was mentioned, I believe by your organization, that this represents 5.7% of revenues of a station. I'm saying a station; I mean broadcast revenues. Is that the accurate number?

Ms. Victoria Shepherd: Is it all right if I jump in here?

A voice: Please do.

Ms. Victoria Shepherd: In the 2010 Copyright Board decision, when they set the rate, it was an effective rate of 5.7%, but they do take into account the size of the station, the amount of music that's played. For example, if you're looking at a small-market station, which the CRTC defines as having a market of less than 250,000, that rate is 0.59% of revenue, or about $700 per year.

When the Copyright Board looks at this, they do take into account those factors of size of market and use of music. And at the Copyright Board both parties come and present their cases, so whoever has filed the tariff, the rights holders, will present their cases, and then the broadcasters have the equal opportunity to come in.

It truly is an impartial judicial body.

Mr. Phil McColeman: Right.

As your organization represents the creators, and you talked about the broadcasters receiving efficiencies in their operations because of the digital technologies, are you benefiting from those efficiencies as well, in terms of your business model?

● (0945)

Ms. Victoria Shepherd: I'm hesitant to speak to that, simply because as a collective licensing agency we're not in the business of producing the music and distributing it. Our role is to collect revenue for our members. I don't feel I'm qualified to answer that question. I'm sorry.

Mr. Phil McColeman: Okay.

Perhaps another angle here is what we were told by a number of the broadcast representatives: they're receiving it in a form that they can't easily use; it's being sent out in a form that they have to have certain technologies with which then to transfer. It's not like a common digital technology that is integrated together with the people who are distributing.

Are you aware of that?

Ms. Victoria Shepherd: I can't speak to whether or not the delivery software is compliant with all of the stations. Every station could be using something different. What I can tell you is that when this music is delivered to the stations, it's at no charge to them. They're actually obtaining and acquiring their music at no cost.

The Chair: Thank you, Ms. Shepherd and Mr. McColeman.

Now moving on to Mr. Regan for the final five minutes of the first round.

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

Thank you to the witnesses for being here. Those five minutes are very short, so I'll get going.

Ms. Shepherd, I have to start with you because you mentioned Randy Bachman.

Ms. Victoria Shepherd: Yes.

Hon. Geoff Regan: He has a fantastic show on Saturday night on CBC radio. My wife and I often hear it and enjoy it thoroughly. He's been around for awhile.

Ms. Victoria Shepherd: Yes.

Hon. Geoff Regan: He may recall, or at least recall hearing when he was a kid, the idea I recall hearing about, that at one time radio stations not only got their 45s and their records sent to them at no cost, but arguably at one time they actually got what was called payola: they got paid to play. That's what we've heard anyway. I don't know if that's true or not. I suspect it may be.

We heard last week from Mr. Don Conway of Pineridge Broadcasting, who was telling us about the history of his experience and the situation of his very small radio station, the troubles they're having, the difficulty they have. They just broke even last year, he said. He's saying the costs of ephemeral rights, or the licence fees they're paying, have been going up and up and up.

The other thing he mentioned is the 30-day exemption. He talked about, as you mentioned, this question of having to roll over the copies they have every 25 days.

It sounds as if there's no value to them, actually, of this 30-day exemption in practical terms in the way they use the music. Yet his concern is, how does a small station survive, and what should the right balance be?

What is your response to that kind of concern? Then I'll ask Ms. Saxberg to add her comments.

Ms. Victoria Shepherd: As I just mentioned, when the Copyright Board looks at ability to pay, which they are obliged to do, they would look at a small market station. You're paying 0.59% of your revenue and it's a cost of $700 a year.

Let's say that music is 80% of the raw material you're programming. I think $700 a year is a pretty sustainable rate for that amount of content, which is then going to attract your advertising dollars as well.

Hon. Geoff Regan: Ms. Saxberg, this bill provides—sort of—that if you want to format shift, for instance, put some music that you have on a CD, or whatever, onto your iPod, you'll be able to do that —

Ms. Catharine Saxberg: Right.

Hon. Geoff Regan: —unless of course there's a digital lock on it. The idea basically is that if you pay once you should be able to do whatever you want with it.

The radio stations argue that they've paid once for the licensing fee and therefore they should be able to do other things with it, such as format shifting.

What is your response to that?

Ms. Catharine Saxberg: When you say they've paid once—

Hon. Geoff Regan: In other words, their argument is that they've already paid for this music with the licensing fee.

Ms. Catharine Saxberg: Well, as Ms. Shepherd has pointed out, they haven't paid for the music coming in the door. That music is provided to them for free.

Are you talking about the fact that they've paid for performance royalties?

Hon. Geoff Regan: Yes, that's what they were arguing.

Ms. Catharine Saxberg: This goes back to the fundamental principles of copyright that have been globally held right back to the 19th century. There is a right of communication and a right of reproduction. Each of these rights has an individual value, and each of these rights is used differently. They pay for the performance of the music, on one hand, which is one use with one value. The right of reproduction is another use with another value.

They are not paying for the same thing twice; they are paying to do two separate functions, and they're paying for the ability to do each of those functions individually.

Hon. Geoff Regan: Let me ask you about the Pirate Bay issue you raised. You mentioned that in Britain they're able to get injunctions. Is that what you're suggesting here? Or are you suggesting it in relation to notice to take down?

The difficulty of course with notice to take.... Actually, there are two things. You talked about people who are foreign operators as opposed to domestic.

● (0950)

Ms. Catharine Saxberg: Right.

Hon. Geoff Regan: Are you suggesting that there be a distinction in how you treat them?

One of the worries I have is that you have a small player who is a user or whatever and who has put up something that is allegedly infringing. Maybe it is or it isn't; someone claims it's infringing. If you have notice to take down, the ISP has to take it down—period, that's it—rather than the person who's put it up having the chance to defend himself.

Arguably the ISP shouldn't have to be the arbiter of that. But you make a distinction between domestic and foreign in that regard. What's your comment?

Ms. Catharine Saxberg: Yes, we do make a distinction between foreign and domestic in this regard.

The technical amendment we are proposing is specifically for offshore sites. It's specifically for sites that are rampant pirates and being able to create injunctions that would block them from entering into Canada.

Hon. Geoff Regan: Good.

[*Translation*]

Mr. Chenart and Mr. Céré, do you prefer the Supreme Court of Canada's test in the CCH case, and would you like to see it in the bill?

Mr. Mario Chenart: Do you know about it?

Mr. Jean-Christian Céré: No, I don't.

Mr. Mario Chenart: I don't have the answer to your question.

Hon. Geoff Regan: We were talking about the Berne Convention.

Mr. Mario Chenart: Yes, I know all the work that was…

[*English*]

The Chair: I'm sorry. We're well over time.

Thank you very much, Mr. Regan.

Now we'll move on to the second round, and Mr. Moore, for five minutes.

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

Mr. Chenart, you said that the Internet has shaken the industry. Yet we're in a time when Canadians and people worldwide are consuming more than ever.

We heard testimony yesterday about a famous Canadian star, Justin Bieber. There's a movie out about him. It's called *Never Say Never*. It chronicles his rise to fame, tied very closely to new technology, the Internet, to options that weren't available even 10 years ago.

How do you reconcile that? Are some people better than others at taking advantage of new technologies—the new formats, new ways to succeed?

It would be hard to argue that he is not a success. He's a great success, but his rise to fame was done in a very unconventional way.

Can you comment on that?

[*Translation*]

Mr. Mario Chenart: I think that the new technologies make a lot of people a lot of money, including creators and producers and anyone who profits from the use that consumers make of the new technologies. In this case before us, the consumer continues to pay to have access to the material. The consumer pays money to buy a song directly in the store in the same way as he does to obtain a file. Today, when he logs on and accesses the songs, he pays, he always pays, but the money does not necessarily go to the artist.

In the case of Mr. Bieber, I am not familiar with the detailed list of the songwriters who write his material, but they are not the stars. It's Mr. Bieber who is famous. If I write songs for him at my home, what good does it do me that he is a star? If the songs are played on the radio, I am going to get royalties. If a song appears in a video, I am going to get royalties.

If people copy the files on the Internet, I get nothing. Someone makes a lot of money selling bandwidth, implying that the money does not go back to the creators.

Mr. Jean-Christian Céré: I would like to add that you have to distinguish between stardom and compensation. It is true that there are people profiting from the fact that the physical distributor is no longer an obstacle. Now, with YouTube at our fingertips, it is true that people can take advantage of it. They do so to get a degree of stardom, but it is fleeting. One day, those people are going to want to be compensated for continuing. If not, they will give up. So if they want to be compensated, a compensation system must be put in place. Otherwise, they may be stars, but they are starving ones.

The copyright system that has been set up for a long time includes public performance and mechanical reproduction. We must not let the platform, the Internet in this case, cause established principles to be changed. Those established principles must be applied to this new platform, this new way of distributing music.

● (0955)

Mr. Mario Chenart: In the same way, if Mr. Bieber does commercials for Coca-Cola or if he is able to sell out his shows for $100,000 in huge arenas, it changes nothing for the songwriter. The singer gets the money at that point.

[*English*]

Hon. Rob Moore: I think he's doing okay. I read yesterday that he bought a house for $12 million, or something, so he's one success story.

Ms. Saxberg, we've heard testimony that there is a great need for change in Canada. We on this side of the House believe that we have to update copyright. Most of the people who have appeared as witnesses have said we absolutely need to do this. We need to bring Canada into the 21st century. However, they had a few technical amendments. It illustrates that we're trying to strike a very strong balance. That's the goal of the government.

You mentioned that copyright is only as strong as its weakest link. Right now among our partners internationally—our peers, if you will—is Canada the weakest link?

Ms. Catharine Saxberg: It's a great question, and I wish I had a really good answer for you. I don't, unfortunately, because copyright is such a complex thing. There's such a long list of components within any copyright act, and to say that this act is really good overall and this act is really bad....

I don't think Canada is the worst in copyright. If you asked me who was, I don't think I could say that a particular country was doing it worse than we are. There are countries that are stronger in some areas than we are, and we are stronger in other areas than other countries.

The Chair: Thank you, Ms. Saxberg and Mr. Moore.

[*Translation*]

Mr. Dionne Labelle, the floor is yours for 5 minutes.

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

A number of groups representing rights holders have come before us to testify about the content of the bill and to tell us how it weakens the copyright protections that they are defending. We have been told about the removal of provision 6, which allowed the temporary recording exception to be broadened, an idea that is totally vague. We have also been told about the lack of precision in the 30-day exemption, and about what it is possible to do within that period. You have explained to us that it opens up the possibility for radio broadcasters to re-record the copies of the material that they already have in their hands. It also removes in perpetuity the need to pay mechanical rights that are part of the few additional rights that allow songwriters to continue to work.

What we have heard about that from the representatives of large radio station owners groups precisely confirms the fears you have expressed. Some have actually even wondered about the way in which they can make copies instead of paying a license fee. I imagine that kind of thinking makes you a bit hot under the collar.

Mr. Mario Chenart: Getting back to Mr. McColeman's concern, we are in favour of prosperity for everyone; we simply want to participate in it. The rules that are in place ensure that all those whose works are involved in generating this prosperity get their share. The Copyright Board studies the value of everyone's contribution, establishes a right, and each party is invited to defend his point of view. The board does this work, and so it is strange that the government wants to intervene to eliminate something that is already in place, works well and has been validated by an administrative tribunal. The rules are clear and we would like them to stay that way.

Mr. Jean-Christian Céré: Music is the raw material of radio. When you tune in to a radio station, you often hear music, and that is the flagship product and raw material of radio.

Is paying less than 6% of one's revenue too much to obtain all of one's raw material? If tomorrow I open up a bakery or a pastry shop, or if I work in the automobile business or the pulp and paper industry, and if only 6% of my expenditures go to acquiring my raw material, I think I am going to have a very positive balance sheet.

And so we have to wonder what the value of music is. How can its value be quantified and how can some of what it generates be returned to those who created it?

● (1000)

Mr. Pierre Dionne Labelle: While listening to your testimony—yesterday I had the same impression while listening to the testimony of the writers' representatives—I got the impression that our creators, particularly Quebec creators insofar as we are concerned, have a greater need for these sums of money, which are small sums, but which, in total, allow them to...

How would you describe the situation of Quebec artists generally, as regards the collection of copyright fees, and the need to keep these small sums of money?

Mr. Mario Chenart: For each person who makes a fortune in this area, there will be 50 who will contribute to our diversity and earn a small amount. These are the people we are thinking of. Clearly I don't think Justin Bieber needs piecemeal calculations, but there are a lot of people who are not stars.

I am thinking of songwriters and composers; I represent people who are not singers, who are not musicians, and who do not collect studio fees. They write a song that is sung by someone who may or may not become a star. That person's living will be dependent on the number of times the song is played on the radio, on television, or sold as a file or a disk. Songwriters earn 9 ¢ a song. That is what they earn.

If Céline Dion sings on the Plains of Abraham and is paid a talent fee of a few hundred thousand dollars, as a songwriter, I will earn a percentage of the rights the song she sings will generate. If the show is broadcast on television, I will earn something, and if she makes a disk, I will earn something there too. That is how I will earn this money; I will not get any part of the money for an advertisement Céline Dion makes for Chrysler, nor a portion of her fee for a show in Las Vegas. I will get a copyright fee for the concert, for the reproductions, etc. That is all I will get.

Mr. Pierre Dionne Labelle: When the Conservatives introduced these measures aimed at virtually abolishing mechanical rights, they said their purpose was to protect the small broadcasters. A broadcaster may pay $820 a year for mechanical reproduction rights; that does not seem like an abusive sum to me to contribute to the support of Canadian and Quebec artists.

Mr. Mario Chenart: If you multiply that by the number of songs a songwriter writes in a year, you will see that we have not made anyone very rich. The quotas are very respectful of the size of the radio stations. All of the community radio stations pay a symbolic tariff, but it is different for the other stations, those that generate profits.

I was listening to the testimony of the radio station representatives and their famous argument. I thought of my brother-in-law who made support payments for a large part of his life...

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

[*English*]

Now we'll go to Mr. Calandra for five minutes.

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

Ms. Shepherd, I want to try to understand this a little better. When the radio stations came, when some of the broadcasters came, they said they download music from a system. I'm assuming you're familiar with the system. That's how they access the music.

To your knowledge, can this system be modified so that you can't download and use songs for 34 days, 33 days, 32 days?

Ms. Victoria Shepherd: That's a technical question that I don't have the answer to, I'm sorry.

Mr. Paul Calandra: Could you find that out for us and get back to us?

Ms. Victoria Shepherd: Absolutely.

Mr. Paul Calandra: The point being if a radio station doesn't have the ability to download for 33 days and somehow the industry can place that, then it would seem that the fear of erasing and recopying would be somewhat in the control of the person who's making the download available and not necessarily the broadcasters themselves, if they did it.

So if you could get back to me on that, I'd appreciate that.

Ms. Victoria Shepherd: Absolutely.

Mr. Paul Calandra: Mr. Chenart, you were here, I think, last week—

[*Translation*]

Mr. Mario Chenart: Yes.

[*English*]

Mr. Paul Calandra: —with another group. I don't have their name handy, but if I recall correctly, they represented 100,000 Quebec songwriters.

[*Translation*]

Mr. Mario Chenart: The rights holders.

[*English*]

Mr. Paul Calandra: Let me ask you this. If I'm writing a song for any artist, do I get paid to write the song?

[*Translation*]

Mr. Mario Chenart: No, you are not paid for writing it. You will only see an income if your work is used. Some publishers will pay an advance to a songwriter, if there is a publisher in the business plan. The publisher may pay an advance on royalties that may be collected if the song is a money-maker. We only get a percentage of what the song generates.

● (1005)

[*English*]

Mr. Paul Calandra: Can I write a song and sell it to an artist? Am I forbidden from doing that?

[*Translation*]

Mr. Mario Chenart: It is not a common practice. I am not saying it is impossible, but it is not the norm.

[*English*]

Mr. Paul Calandra: Okay.

[*Translation*]

Mr. Mario Chenart: There is another indirect answer to your question: there are some very well-known artists who will say that if their name goes on an album, they may help increase the sale of disks, and so they ask for an advance for every 100,000 disks sold, for instance. That is an advance. Someone who takes a financial risk by deciding to pay for a song written by Luc Plamondon or Gordon Lightfoot, for instance, may ask for an advance for a larger number of sold copies.

[*English*]

Mr. Paul Calandra: In your submission you also talk about making Internet service providers have far greater responsibility... how does that differ? How do you police...? Today you're talking about representing 800 people. When you were here the other day it was 100,000.

[*Translation*]

Mr. Mario Chenart: The SPACQ has 800 members, who are for the most part francophone songwriters and composers who write for films and television. In English Canada, there is the Songwriters Association of Canada and the Screen Composers Guild of Canada.

[*English*]

Mr. Paul Calandra: How does your organization police the people it represents to make sure they're not doing something illegal and bringing disrespect to your organization?

You don't, right? Presumably you don't. They're members of your society.

[*Translation*]

Mr. Mario Chenart: No, but we do not use their repertory for commercial purposes, however.

[*English*]

Mr. Paul Calandra: So why would the Internet service providers be any different? I think when you were here last time I gave the example of a builder who builds a home and someone puts a grow op in it. Is Hydro-Québec responsible because they put the hydro in the home? Is the homebuilder responsible because he built a home that could be turned into a grow op?

Again, is it not the same type of argument?

[*Translation*]

Mr. Mario Chenart: That is a very good question. I believe that they might act if they were made aware of the fact that someone is doing something illegal in that place and if they remain silent about it, if they do not intervene to divulge that information and stop things from happening or inform the authorities, they could be considered accomplices.

[*English*]

Mr. Paul Calandra: Okay. You also—

The Chair: Sorry, Mr. Calandra. You have four seconds left, so I don't think you'd be able to get the full question in.

Mr. Paul Calandra: Okay.

The Chair: I appreciate that.

Now we're moving on to Mr. Cash for five minutes.

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

Thanks to all of you for being here and to some of you for being here again.

I wanted to get back to this confusion on the government's side around the idea of paying twice for something. Let's say a radio station leases or rents space, an office space, to do business. They rent it. Does that mean they shouldn't be paying for the heat, the hydro, and the telephone connection? No. Of course they're going to pay for those things, too. But what the government is saying is that they should pay for those things, but they shouldn't pay for the right of reproduction. Either the government is very confused about the business that we're in here—in the music business, in radio—or they are intentionally obscuring and confusing the issue.

The issue here is that radio stations are not paying twice. They're paying for very different uses. It's similar to saying that I buy a car and therefore I shouldn't have to pay for parking because I've already bought the car. I've paid for it once already, so what the heck?

For anyone who's ever worked in the music business or in any creative industry, the argument is absurd.

Ms. Saxberg, I want you to just help the government side understand the realities of life as an artist. We're talking about fairness here, right?

We're talking about fairness. We know that the music industry has taken a hit over the years. We know that. We know that artists have struggled. We know that labels have struggled. At the same time, we also know that broadcasters have had a field day.

So where is the fairness? Can you please help these guys understand the realities of the business?

● (1010)

Ms. Catharine Saxberg: I do think my colleagues have put forward some really helpful information today in terms of the historical context and the original thinking by the Copyright Board to have discounted rates, essentially, when radio was hurting, in order to demonstrate the music industry's willingness to play ball with a very important partner. Radio is still probably one of the most important—if not the most important—individual drivers for getting people to share new music, but it's by no means the only individual driver.

I started my career in radio. When I started my career in radio, it used to be that you could play a song on a Tuesday morning on a radio station and there would be lineups at the record store, right? There was that kind of really intense cause-and-effect relationship between the music industry and the radio business. That's not the case anymore. That's not to say that radio isn't still incredibly important in the value chain for music, but there are a lot more ways in which music is being exposed, and the ways in which people consume music are very different.

So in some ways, to my colleagues' point, the amounts that radio stations were paying for rights over those years were deliberately undervalued, because in some ways there was the argument that radio stations make over and over again about the promotional value of music, which is still valid, but not nearly to the same degree that it was 10 years ago, 5 years ago, or 20 years ago. So given that the relationship has changed, given that music was undervalued, what we have now been doing is bringing the value of music up to what is actually a fairer market value.

That, I think, has been part of the struggle here in trying to understand the differences in terms of the rights that we're compensated for and how they compare over the historical record.

Mr. Andrew Cash: Thank you.

I wanted to ask Monsieur Chenart if he could speak a little bit about the ways in which artists, musicians, and composers eke out a living. I listen to the government side, and they talk almost dismissively about this $21 million. On top of that, we have private copying. Tell us about the realities. We're not talking about a bunch of millionaires here, are we?

[*Translation*]

Mr. Mario Chenart: Everything depends on the market in question. If we are talking only about the Canadian market, the figures will not be the same as on the international market. If you want to have a career in Quebec, for instance, a successful song may generate $10,000. Can you live on such an income?

And so you have to write many, you have to find someone to sing your songs, and you have to write a lot of them. Perhaps you have to do something else. Some musicians write and will have that type of income. They are musicians and will earn fees in studios. They may work on stage with an artist and earn perhaps $300 a day, on the average. As you can see, no one is being bled dry with that sort of fee. Of course...

The Chair: Thank you, Mr. Chenart.

[*English*]

Now to Mr. Del Mastro for five minutes.

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

If I might say at the outset, I just want to thank Mr. Cash for clearing that up for us on the issue. I'd just like to expand a little bit on the clarification, if I could.

There's a very important relationship between radio broadcasters and the music industry, a critical one, I would actually argue. Their industry relies on music to gain listeners, and the music industry depends on the radio broadcasters to disseminate the content. We could argue about whether that's less important today than it was 20 years ago, or what have you, but the bottom line is that they could also make the argument that their focus and part of how they reinvented themselves was to really nail down and focus on local markets, because ultimately every radio station in this country can be replaced. There's no need to go to a radio station on the dial; there's no need for a radio station in Peterborough. If you just want to listen to music, you can buy a satellite subscription and listen to music. The value is in the other things that radio stations are doing. The local content really matters, and it's why radio is popular.

I think in the argument we're hearing here today, both sides have set aside the fact that they're in a necessary relationship. It's a marriage, and it may not be a perfect marriage—and I think that's what we're hearing today—but it's a very important marriage.

What I heard from the broadcasters, and what I continue to hear from them on this—and this, Ms. Shepherd, is what I would like to get an answer on—is they are indicating very clearly that they do pay rights for music, so they're not getting anything free. They pay performance royalties in excess of $60 million, and they also pay in excess of $30 million through a CRTC fund that nobody acknowledges at the committee, but they do pay it, and that goes into FACTOR, a very significant fund for the Canada Music Fund, and then we have the broadcast mechanical. What they're arguing on the mechanical or ephemeral rights is that they don't want to make copies; they'd like to buy the music in the format they use in the first place, but nobody will sell it to them in the format they use.

Mr. Cash used the example of a car. If Mr. Cash wants to buy a car, we don't make him buy a city bus first and then tell him that if he would now like a car we'll sell him one. He can go out a buy a car.

What the broadcasters are saying is that they would like to buy the music in the format they use it in. They don't want to make copies, they don't want to have to re-record things every 30 days, they just want to buy the music in the format they use it in, but the industry isn't providing it to them in that format. Can you tell me why that is the case?

Frankly, if that were the case, the Copyright Board would simply look at the entire issue, ephemeral and performance royalties, and suggest the value of that single payment. It would then be adjudicated as to the fact that they used to have 60 plus 21, and we now have a situation where they're buying strictly in the format they use, and the value is X. I think that's just a simpler system for everyone.

● (1015)

Ms. Victoria Shepherd: I think that's what the Copyright Board did in the activities that resulted in its 2010 hearing. What happened is, at the broadcaster's request, the Copyright Board heard all of the rights holders together in one consolidated hearing. The performance right was considered and the reproduction right was considered. At the end of the day, the effective rate was 5.7% for all uses, the reproduction activity and the performance activity. The effective rate across the board was set at 5.7%, and then, from there, each tariff is given a relative value. So that is, in fact, what the Copyright Board did.

To go back to your point about the digital delivery service, again, I can't speak about that. I can tell you that they're not being sold music because it's being delivered to them at no cost.

In terms of what kind of format they want the music in so that it's compatible with their servers, I can't speak to that because I don't know if radio stations are all using exactly the same system.

I think, on our end, there's no debate for us in terms of whether or not broadcasters are valuable partners, but you guys very clearly said that this 30-day exemption was temporary, and we just want to make sure that's what it is.

Mr. Dean Del Mastro: I think what we were getting at, and I think we were clear on this as well, is that we think there should be a single payment.

In the retail industry we do have a clarifying statement that most retailers are now forced to make, which is “included at no extra charge”, and I think that's what the service is providing to them.

I really appreciate the panel today. I think we've had some excellent testimony. Thank you very much.

The Chair: Thank you very much, Mr. Del Mastro.

Now to Monsieur Nantel. *Cinq minutes, s'il vous plaît.*

[*Translation*]

Mr. Pierre Nantel (Longueuil—Pierre-Boucher, NDP): Thank you, Mr. Chairman.

Thank you to all of you for being here. I would like to specify that it is indeed the work of the Copyright Board to regulate all of this and that in this bill, the 30-day exemption is unfortunately a loophole that allows for a constant renewal of those 30 days. Therein lies the problem.

If we could at least limit the number of repetitions of that copy, this loophole that is cheerfully proposed to broadcasters so that they can avoid the Copyright Board would be abolished.

We have to stop going around in circles. This is an issue that falls under the purview of the Copyright Board, end of story. If we want to avoid any problem, we have only to ensure that there will be no renewal of this grace period of 30 days. It isn't complicated.

A little earlier, I heard people talking about ephemeral copies, mechanical rights, of course, but also about levies. I also heard the words "format shifting". In reading your document, I can see that there is a serious problem related to backup copies and personal copies in sections 29.2 and 29.4 of the act.

Don't you find it unfortunate that the words "format shifting" do not appear in the act? Would the use of those words not be preferable to the prevailing vagueness that allows people to make copies for themselves, for some use or other?

● (1020)

Mr. Mario Chenart: Do you mean technological processes?

Mr. Pierre Nantel: Yes.

Mr. Mario Chenart: We analyzed these terms in cooperation with SODRAC, and we fully subscribe to all of the amendments SODRAC proposed in this regard. This very technical work was done by SODRAC. That organization did the meticulous work involved in drafting amendments in very clear, simple, concise and surgically precise terms so as to modify the current text of the act, so that it will not have an adverse effect on our people.

Mr. Jean-Christian Céré: Insofar as personal copies are concerned, we say that a copy is a copy, no matter what support is used to make it. Ideally, we would extend the personal copy provisions to iPods, that are used to make more than 70% of copies. Failing that, at least let us not introduce that exception that will put a complete end to personal copies in the very near term. Year after year, this generally amounts to about 30 million a year.

In an industry where all micropayments are important, we can say that personal copies are excessively important for all of the rights holders. They are a source of income that can help artists to persevere and continue to create rather than choosing to do something else.

Mr. Pierre Nantel: Earlier, I heard Ms. Saxberg say that according to the Berne Convention, a right cannot be withdrawn from someone. And so it is important to remind everyone that the personal copy regime has already been established. In fact, it is established regarding CD-Rs. Technology has evolved toward... So this is not a new right or a new royalty, but something that applies to the replacement of the CD-R technology.

Mr. Chenart, you wanted to add something?

Mr. Mario Chenart: I simply wanted to remind people—if there were colleagues who were present when the law that applies to personal copies was brought in—that right from the beginning, it provided that audio supports were covered. A large company challenged the text of the law and won its case. And so we lost that right, which was contained in the spirit of the act and was spelled out, because of a legal formulation. The Supreme Court entrusted the duty of correcting that to political leaders, but it was never done. We are here today, and we have the opportunity of doing that.

Mr. Pierre Nantel: That is correct.

Mr. Mario Chenart: It was in the act right from the beginning.

Mr. Pierre Nantel: Quite so.

In fact, I would very much like to hear what you have to say about the pricing policy of the iTunes Store.

We can talk about all sorts of things here for a million years, but in reality, we all know that 90% of the music on iPods is generally downloaded illegally. Moreover, we also know that there is, strangely, a right to 10 reproductions on computers and 5 on portable readers, or the reverse, when you purchase a song from iTunes.

How do you feel about that?

Mr. Mario Chenart: Honestly, I am not even aware of the most recent changes in this particular case. I don't know if Jean-Christian would have an answer.

I do know that collective agreements are concluded with our associations to manage the rights of songwriters and composers in these cases. To my mind, iTunes has a licence.

The Chair: That is all the time you have. Thank you.

[*English*]

Now we go to Mr. Lake for the final round of questioning in the second round.

Mr. Mike Lake: Thank you, Mr. Chair.

Thank you again, witnesses, for coming before us today.

One of the things I find interesting is that before this committee we hear all about the negative side to technology and we hear very little from the different representatives about the positives.

Ms. Saxberg, you talked about how there was a time when you used to listen to a song on the radio and then a couple of days later, or the next day, there would be a lineup at the record store. I live in a world where now I listen to a song on the radio, I pull out my iPod or my iPad, open up Shazam, find out what the name of the song is and buy it within a minute on iTunes, and I pay for it, or I might even buy the album and I pay for the album.

Ms. Catharine Saxberg: Bless you.

Mr. Mike Lake: I would say that's a tremendous opportunity for creators, not a cost to creators.

Ms. Catharine Saxberg: Absolutely.

Mr. Mike Lake: Of course, if we get this copyright bill right, we will create an environment in which consumers will pay for their music. It's something that admittedly is a problem. It hasn't been happening over the last decade or so, and we want to create an environment where that does begin to happen.

I guess I'll ask you a question. What other opportunities do you see for creators of music if we get this legislation right?

● (1025)

Ms. Catharine Saxberg: I think you've raised a good point. I think it is important to clarify that we are certainly not coming here as Luddites or haters of technology. Music publishers have always dealt in an intangible. We deal in the business of the song. So whether it's a player piano or an eight-track tape or an MP3 file, it's just another day at the office to us. We are not wedded to a particular technology or a particular format. I think we've shown over the years that we can adapt fairly quickly to different kinds of technology. We are not anti-technology at all. We see tremendous opportunities within the Internet.

Certainly having the ability to expose the kinds of music that radio is not always comfortable playing goes exactly to your point. Take a look at the great new service on CBC, CBC Music, on which you have all kinds of channels and all kinds of music that doesn't get played on typical radio in Canada. Right now there's tremendous potential for exposure of music with technology. What we haven't caught up with is the same kind of tremendous ability to be compensated, and that's the piece that we have to put into place. It doesn't mean that we—

Mr. Mike Lake: I would argue—and sorry, but my time is really short—

Ms. Catharine Saxberg: Yes.

Mr. Mike Lake: —that actually we do have.... When I can instantaneously find out the name of the song on the radio, which I've never heard before and which is by an artist I've never heard before, and I'm able to purchase that music instantaneously, I would say that artist is getting compensated in a way that would never have existed before.

Ms. Catharine Saxberg: Agreed.

Mr. Mike Lake: Oftentimes in the past, I would have gone on with my day and forgotten about the song and certainly never would have made the purchase.

Ms. Catharine Saxberg: I agree absolutely. But the thing is, your behaviour is not widespread behaviour. If all Canadians were like Mike Lake, we would probably be much better off as a music industry.

Voices: Oh, oh!

Mr. Mike Lake: I like that. I should almost end right there. But I'm not going to.

Ms. Shepherd, you made a statement that the music is delivered at no cost to the radio stations. You kind of let it hang there. Is there a law that prevents the music industry from charging the radio stations for the music?

Ms. Victoria Shepherd: No, absolutely not.

Mr. Mike Lake: So who makes the choice to provide it at no cost?

Ms. Victoria Shepherd: That would be the rights holder.

Mr. Mike Lake: Okay, so just for clarity, there's no law that prevents that.

Ms. Victoria Shepherd: No, absolutely not.

Mr. Mike Lake: You could charge. You choose not to because it's good for exposure.

Okay. I just wanted to make sure we were clear on that.

One of you made a statement at some point in the conversation about the reproduction right, and you talked about the opportunities that radio stations have that are made possible by the reproduction right. I would make the argument that the possibility is there, and the efficiencies are actually made possible by IT providers who develop the technology that allow them to transfer the music and play it in a different way.

Is that maybe more accurate?

I'll just ask this. What do music creators do to create that technology that allows them to realize those efficiencies?

Ms. Victoria Shepherd: I can't speak to the IT industry and what they invest in terms of creating these kinds of mechanisms. What we have seen and what the Copyright Board has adjudicated is that as a result of the technological innovations that have led to enormous efficiencies, the broadcasters have been able to increase their profitability. Those statistics are cited on the CRTC website as well.

I'll go back to the Copyright Board's mechanism, because they do look at all of those factors, including ability to pay. I don't think anyone, including the broadcasters, has disputed that there's a value to the copies. What we're here asking for today is just to make sure that the stated intent that copies would be temporary actually materializes in the bill.

The Chair: Last question, Mr. Lake.

Mr. Mike Lake: We've heard a lot of talk about all sorts of different things that may or may not be true during the committee hearing, and I always like to go back to the facts, go back to the legislation, go back to some of the documents that are being referred to.

I would note that the Berne Convention, when it talks about reproduction rights says:

> It shall be a matter for legislation in the countries of the union to permit the reproduction of such works in certain special cases provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.

That's what the Berne Convention says. I don't think anyone would argue that this is a technical reproduction. It doesn't add value or change the music in any way. In the Berne Convention, what would prevent us from changing legislation to allow that?

We're being asked by you to change the 30-day exemption one way, by what you call a loophole.

● (1030)

Ms. Victoria Shepherd: Right.

Mr. Mike Lake: We're being asked by the other side to change it in a different way. What prohibits us, as legislators, from changing the legislation?

Ms. Victoria Shepherd: I can't speak to that because I'm not a copyright lawyer. What I can speak to is that we're not actually asking you to change.... What we're asking for is just to make sure that the bill says what it's supposed to say, what you have said that you want it to say, which is that the 30 days be 30 days. What we're asking for is really just a technical change. There hasn't been any request for any kind of a policy change.

We're just saying that the government said these were temporary copies. And we just want to make sure that they are indeed temporary copies, which was your stated intent.

The Chair: Thank you.

Sorry, Mr. Lake. We're well past the time.

Ms. Shepherd and Mr. Lake, thank you for that. I'd like to thank the witnesses for coming today. It's much appreciated. Your testimony and input are valued by this committee.

We will suspend for five minutes.

● (1030)

(Pause)

● (1035)

The Chair: Good morning, everyone. Welcome to the second half of meeting number 8 of the Legislative Committee on Bill C-11.

I'd like to welcome all of our guests and our witnesses here this morning. Starting with the Canadian Educational Resource Council, we have Gerry McIntyre and Greg Nordal. From the Canadian Publishers' Council, we have Jacqueline Hushion and Mr. David Swail. And from the Canadian Association of Law Libraries, we have Mary Hemmings.

Again, thank you for appearing today. Each of you has been briefed by the clerk that you have 10 minutes in opening statements per organization. Starting off with those 10 minutes will be the Canadian Educational Resource Council.

Dr. Gerry McIntyre (Executive Director, Canadian Educational Resources Council): Thank you, Mr. Chair and members of the committee, for making this time available to meet with you and share some views on Bill C-11.

My name is Gerry McIntyre. I'm executive director of the Canadian Educational Resources Council, which is the trade association of the major Canadian publishers for the K to 12 system in Canada. Our members account for 75% of the curriculum-based learning materials that are used in Canadian schools outside of the province of Quebec.

Before being approved by ministries of education for use in Canadian schools, our resources are evaluated very rigorously in terms of their match to what students are to be learning, the age appropriateness of the material, the grade specificity of the material, the absence of bias from this learning material, and, importantly, that it reflects the Canadian experience in all possible ways.

For any given grade and subject, the cost of developing an education resource that matches the curriculum ranges from $400,000 to $1 million. That is with no guarantee of sale of the product and with no alternative market for a product developed so specifically. So clearly the K to 12 education market in Canada is one that involves considerable investment and a considerable level of risk.

I am delighted to have with me today Mr. Greg Nordal, who will provide you with a publisher's perspective on Bill C-11 and what it means for that market.

● (1040)

Mr. Greg Nordal (President and Chief Executive Officer, Nelson Education, Canadian Educational Resources Council): Thank you, Mr. Chairman and committee members, for this opportunity to address you on behalf of the K to 12 educational publishers sector. My name is Greg Nordal and I'm president and CEO of Nelson Education, Canada's largest publisher in this segment. We have roots in Canada going back to 1914.

There are many positive components of Bill C-11. Our industry is fully supportive of the intent to modernize copyright law in Canada and much of what we see in Bill C-11 achieves its purpose.

However, the educational fair dealing exception clause, as drafted, is problematic in many ways. It would create an environment of uncertainty for Canadian rights holders and authors, it would lead to an unacceptable level of investment risk for publishers and potentially harm the market, and it would have the unintended consequence of undermining the future availability of indigenous materials and learning resources created specifically for Canadian students and educators.

From the point of view of the creative community, the issues are clear. Who could reasonably expect publishers to spend millions of dollars a year investing in new learning resources for Canadian schools if rights holders are not protected and there's no viable expectation of return? What incentive do Canadian authors have to invest their time and talent to create content without viable opportunities for compensation?

This committee has heard some contend that educational fair use exceptions have worked well under U.S. law, so why would Canadian publishers have any concern? However, there is an important distinction to be made here. In the U.S., fair use provisions make it clear that commercial harm to right holders is the primary determinant of fair use in copyright. That's the trump card. In Canada, on the other hand, the much discussed six-step test is to be used to determine what is fair. Commercial harm is but one test of the six under CCH to help assess what is fair. Commercial harm is not deemed as the most important test, and in and of itself commercial harm does not determine what is fair. In the U.S. the effect on the market for the copyright work is determinant, and it is the central fair use factor. This principle gives U.S. publishers the comfort they need to invest in new and innovative solutions for schools, students, and educators. To suggest that the fair dealing exception in Bill C-11 is comparable to fair use protection is extremely misleading. To suggest that the six-step test is adequate protection for Canada's creative community is worrisome indeed.

This committee has also heard from some within the educational community who say that Bill C-11 changes nothing with regard to compensation for educational publishers and authors, that our concerns are unfounded, and that these words are contradicted by real world experience.

I speak from such experience in the K to 12 publishing sector. The Copyright Board issued a decision in 2004 that set out what uses are fair by teachers and are to be considered fair under fair dealing. This decision was appealed by the ministers of education to the Federal Court, which in 2010 affirmed the Copyright Board's decision on fairness. Publishers have accepted both the Copyright Board's and the Federal Court's rulings on what is fair, but not so the educational sector. In fact, the educational sector has contested the fairness determination all the way to the Supreme Court, which heard the issue in December 2011. The decision is pending. Despite multiple rulings on what is fair dealing and fair compensation for the creative community, this issue, 10 years after the original Copyright Board decision, has still not been accepted by the K to 12 market. It's worth noting that the litigation has been lengthy, costly, and has generated much uncertainty in Canadian publishing for authors, publishers, and other stakeholders. The proposed exception will further undermine protection for copyrighted materials in the educational sector. The proposed educational exception will have an adverse impact on our market, based on experience.

To be clear, the amount of classroom copying that is happening today is not trivial. On an individual classroom basis, the amount of copying may seem a trifle to some but in aggregate the amount of copying taking place is immense. In 2009, over 300 million pages were copied in Canadian K to 12 schools. That equates to over $40 million in annual book sales, given the typical size and price of a book at the K to 12 level alone. If you include higher education, colleges and universities, the figure is much higher. It's well over half a billion pages copied on an annual basis, and these are materials copied directly from copyrighted works. We're not talking about what's freely available.

It is possible to amend the fair dealing exception so that it reflects the stated positions of the ministers of education, the Canadian School Boards Association, and others. But this is not about avoiding fair compensation to rights holders. It should not be a problem for the educational community, based on their assurances on this point, to accept the amendments we have tabled for consideration.

● (1045)

On behalf of Canada's K to 12 publishing community and industry, I urge the committee to make the technical amendment we are proposing. This will clarify that fair dealing for educational purposes does not eliminate the need to provide fair compensation for rights holders. Let's make it clear under the law that fair dealing is not free dealing.

Failure to provide a technical amendment that protects copyrighted works will imperil the availability of resources created in direct response to the needs of Canadian school children, as determined by the curriculum. The capacity of the Canadian publishing community to share stories and communicate the values, culture, and history of Canada is at serious risk if the current exception goes unamended. Our market will be harmed.

The potential for devastating unintended consequences is very real. In the long run, it's not just the authors, content creators, and publishers in Canada who will suffer, but also the Canadian students and educators we serve.

Thank you very much.

The Chair: Thank you, Mr. McIntyre and Mr. Nordal.

Now we'll hear from the Canadian Publishers' Council for 10 minutes.

Ms. Jacqueline Hushion (Executive Director, External Relations, Legal and Government Affairs, Canadian Publishers' Council): Thank you.

My name is Jacqueline Hushion, and I am the executive director of the Canadian Publishers' Council. We represent the interests of companies that publish books and digital and other electronic media for college and university students and faculty, for elementary and secondary schools, students, and teachers, and for the professional and reference markets in law, medicine, and accounting, as well as the general interest non-fiction and fiction for children and adults found in Canada's retail marketplace and in all types of libraries.

Together, the members of the Educational Resources Council and our association employ more than 4,500 Canadians. If you factor that up to include other associations in Canada, and ANEL, which was before you the other day, that comes to 9,700 jobs. Some of you have probably seen this document I have here. It has been making its way around lately. In the overall sector to which we belong, those 9,700 jobs factor up to 85,000 jobs at the end of the day.

Our own members invested $75 million in production and manufacture of print. Make no mistake about it, print is still the lion's share of the demand from the marketplace, and our members have to respond to what the marketplace wants. As well, in 2011, our members published 8,000 titles in print and made more than 18,000 Canadian titles available in electronic format—18,000. Our members invested $35 million in the marketing of Canadian print and digital works and paid $50 million in publishing advances and royalties to Canada's authors.

That's what's potentially at stake. Sound copyright that protects the marketplace for copyright works is the spine of the publishing industry's body of work in every country in the world.

Thank you.

Go ahead, David.

Mr. David Swail (President and Chief Executive Officer, McGraw-Hill Ryerson Limited, Canadian Publishers' Council): Thank you, Jackie.

Thank you, Mr. Chairman and committee members, for the opportunity to be here this morning.

My name is David Swail. I'm the president and CEO of McGraw-Hill Ryerson, which is a K to 12 and post-secondary and professional publisher, based in Whitney, Ontario.

I'm going to focus my comments this morning—and this won't surprise any of you, I don't expect—on fair dealing, so I'll be echoing some of the themes you've heard already from my colleagues here.

In our view, the education exception for fair dealing is the most significant new element of Bill C-11 that has the greatest potential for impact on our business. Secondly, and importantly for the committee, it's also the aspect of the bill that we think is most easily and simply amended to satisfy all of the stakeholders I'll be speaking about in the next few minutes.

What I'd like to do, if I may, is to tell my story in three parts.

The first part is about the history of our business. I'm not going to go back to Confederation, but I'd like to talk about the last few decades in our business and focus particularly on the higher education sector. Greg Nordal has spoken very eloquently about the K to 12 space, where we're also very active, but I'm going to focus a little on higher education.

The last several decades in our business have been a fantastic opportunity for publishers in this country in the education sector to develop materials to address the Canadian marketplace specifically. If you look at any of our graphs, you'll see that all of our Canadian content opportunities have been in a wonderful growth mode—and by “wonderful”, I mean this is a mature market, so I'm talking about 3%, 4%, maybe 5% growth, but growth nonetheless—while at the same time, demand for imported products, which principally come from the United States, has been waning.

Where we've found our opportunity, and where our investment has been directed, is in response to the market's demand very specifically for Canadian content. That is equally true in the higher education space, as it is, as Greg mentioned, in the K to 12 space. So it's very, very focused on Canadian resources and meeting customer demands in the education sector, among teachers, instructors, and students, of course, for that kind of material.

What that has meant for us over that period of time is continued investment, not only in resources, but also in some of the numbers that Jackie shared, for instance, employment. There's been significant investment across what we like to think of as a true ecosystem of contributors to our business: from writers to photographers to editors to illustrators to designers to printers to distributors—an entire business built around providing resources to our customer base.

We have come to the point today where we're a significant partner with our customers in education, in all realms—from K all the way through post-secondary, where we're a significant employer. We're a significant investor in the development of Canadian materials.

We like to think that Canada as a country and the students across the country are much better off for the work we have done. That applies equally in K to 12, post-secondary, and also in professional realms. Whether you're a lawyer, a doctor, an accountant, or in any professional realm, significant investment in materials has gone to make your professional lives more meaningful.

That's part one. That's where we have been.

Part two, of course, is where we are today. As it won't surprise you to know, that's really all about digital. We've seen, as I think everyone here knows, a tremendous acceleration in the pace of digital innovation. It's made huge opportunities present themselves to our business. It's placed great demands on our business. But it's also forced us to meet a lot of new customer expectations for information at their fingertips 24/7, supported around the clock, instantly shareable, instantly searchable.

The digital realm we have now embarked upon meeting, and exploiting, if you will, for our marketplace has created tremendous expectations and opportunities for us. It's also meant a very significant reinvestment in the business. At this point in our evolution, we're reinvesting and re-upping the ante very significantly.

As I think Jackie mentioned earlier, print is certainly not going away, by any stretch. But we have an additional opportunity, an additional pressure, put upon us to redirect our investment into new digital resources that are making our print product far more effective. It's more effective in terms of product that can be used to assess how students are performing, more customizable, certainly a brilliant solution from the perspective of distance education for those students who aren't in a bricks and mortar kind of setting, and certainly very adaptable for different learning styles.

The digital revolution has made us far more relevant and created a much bigger opportunity for us. That's really the challenge we're trying to meet in this day and age.

You might ask the question, then, so why not just digital lock, as provided in Bill C-11? Put those on everything you do digitally and life will be good.

● (1050)

I'll harken back to Jackie's point—and Greg made this point as well—that print is still the core of what we do. In the K to 12 sector it's probably 90% of our business, and in higher education it's still probably 80% of our business.

More and more we are providing digital solutions, but they are blended with print. All of you will appreciate that print is a hard habit to break. Even my 14-year-old daughter, who is as tech savvy as anyone, is still very much wedded to her textbooks, so digital locks will not do it for us. In other words, it's not a panacea that will solve everything for us.

Let me come to part 3 and wrap up. Part 3 is really about what we envision Bill C-11 can do for our business in a way that will ultimately protect investment, and you've heard these things from my colleagues this morning also. First, it's about setting a playing field that will continue to encourage us to invest in the creation of these resources, and that means putting the marketplace for the work front and centre and absolute primacy in terms of what constitutes fair dealing.

In our mind, for that reason, the Supreme Court decision around CCH is also not a panacea for the very good reason that it does not place the primacy of the marketplace front and centre. In our estimation, “fair”, intuitively, by anybody's definition, should ultimately mean fair in the sense that it does not impede the commercial prospects for a work, and we find that the CCH decision has very significant shortcomings in that particular respect, so both digital locks and CCH, in our view, are not quite enough to get us there.

We would like to define “education” more specifically. We would like to echo the government backgrounder with respect to what education is and what fair dealing is meant to mean, and a couple of specific issues are, first, fair dealing is not a blank cheque; second, by definition, it does not harm the copyright marketplace. Those are the principles we want to see embedded in a very minor—in our belief—technical amendment to the bill that we think will level the playing field; will continue to create commercial opportunities for businesses like mine, like Greg's, like all the people who compete in our industry; and will ultimately prove to be a better way of delivering better resources for Canadian students.

It will keep investment in Canada, and the other important thing to note is that many of the competitors in our marketplace publish in many other marketplaces. My goal in all of this is to try to retain investment in the Canadian business. That's what employs me. It's what employs my employees back in Whitby. It's what makes the virtuous circle that we have created in our business over the last many decades in this country. This is about ensuring that investment has a reasonable prospect of return in the context of copyright in Canada, and for that reason the amendments that we are proposing are simple, elegant, and meet all the points you have heard from individuals—

● (1055)

The Chair: We're well past your time, Mr. Swail, so thank you very much.

Mr. David Swail: I'll wrap it there.

Thank you.

The Chair: Thank you.

Now we'll go to the Canadian Association of Law Libraries. Ms. Hemmings, you have 10 minutes.

Ms. Mary Hemmings (Chair, Copyright Committee, Canadian Association of Law Libraries): Thank you for inviting the Canadian Association of Law Libraries, L'Association canadienne des bibliothèques de droit, to present its position to this committee. My name is Mary Hemmings. I am chair of the copyright committee for CALL, or ACBD. I am adjunct professor and chief law librarian at Canada's newest law faculty, at Thompson Rivers University. I'm in a unique position for a law librarian. Not only am I teaching legal research at a time of digital change, but I am also starting a new law library when the landscape of the printed word has tilted on its axis. I still buy books. In fact, I buy a lot of books. But I also buy digital collections from many different sources, national and international.

CALL represents approximately 500 academic, private, corporate, court, law society, and government legal professionals working across Canada. We buy legislative documents, case reports, and materials that comment on the law. We provide access to these materials to such people as lawyers, judges, students, faculty, parliamentarians, and the public. And of course we help people find what they want, whether or not we have it in print or locked in a database.

CALL members support these efforts to modernize copyright legislation. We view these changes as necessary to preserving the balance of rights to copyright owners, to libraries, and to the users of legal information in a digital environment.

Today I would like to discuss three areas of concern to the law libraries: fair dealing, crown copyright, and TPMs, also known as digital locks.

Respect for fair dealing is essential to CALL's submission to this committee. Fair dealing and user rights have been discussed by other individuals and associations appearing before this committee, and CALL supports the positions taken by such advocacy groups as libraries, museums, and archives. As law librarians, CALL members are particularly concerned about the fair dealing provisions proposed by Bill C-11.

On the issue of fair dealing, I would like to draw your attention to the 2004 Supreme Court decision in CCH. The library of the Law Society of Upper Canada, whose professionals are members of CALL, is only one of a network of courthouse and law society libraries across Canada, and they were involved in that particular case. It goes without saying that our members support that decision, particularly in its six-step approach to determining fair dealing. We regard fair dealing not as an exception to copyright, but rather as a balanced means of recognizing that limited and fair reproduction is a tool in scholarly discourse. Just as I would lend a book or copy of an article to a friend working on a similar project, the process of sharing information in research and education is not a criminal activity. It is the way that ideas are communicated. We therefore commend the recognition of this principle in Bill C-11.

Having said that, there are other sections of Bill C-11 that appear to contradict the spirit of fair dealing, and in particular the role of libraries. Libraries lend materials to other libraries. This is a fundamental point in our business of meeting the information needs of our users and does not require legislative restrictions on the practice of inter-library lending. Once material has been given to a patron, I am not sure how a lending institution can reasonably comply with the proposal that it must “take measures to prevent” the user from actually making a copy, lending it to a friend, or even dropping it in a bathtub.

Bill C-11 focuses on the use of digital copies. Technically speaking, a digital copy of a book, an article, legislation, or a reported case can be made anytime, anywhere, by anyone. Libraries, archives, or museums should not be held accountable for behaviour that is not similarly policed in book stores or on the Internet.

The Copyright Act should integrate the concept of fair dealing as a user right rather than as an exception to copyright. It should be made explicit that fair dealing needs to be given a broad and liberal interpretation and that knowledge institutions such as libraries, archives, and museums serve a wide variety of institutions.

● (1100)

The CCH decision did not distinguish between a non-profit and a for-profit library. In fact, the CCH decision ruled in favour of the Law Society library, which directly serves the needs of the bar association. Whether or not lawyers make a profit, profit was explicitly considered immaterial in that decision.

On the issue of crown copyright, over a long period of time there have been calls for revisions of section 12 of the Copyright Act. This section relates to crown copyright, and it needs to be explicitly addressed in Bill C-11. The Reproduction of Federal Law Order allows citizens to reproduce federal legislation for personal, non-commercial uses. This is precisely the initiative law libraries want to see in this legislative language. The government has a duty to disseminate the information it produces.

CALL recognizes that producing current government information is expensive, but not as expensive as it once was. At one time, producing and distributing print legislation and parliamentary documents needed editing, typesetting, copy checking, and elaborate distribution methods to satisfy the public demand for access to legislation. Now, digital production ensures accuracy in content, speed in delivery, and a proactive approach to getting government information out to Canadians.

Missing in this equation are the historical legislative documents that are so necessary for legislators and the legal profession if they are to understand how current laws came to be. Retrospective digitization of crown documents is expensive, yet Canadians should also enjoy unrestricted access to documents that inform the present day.

We agree that Canada needs an updated copyright regime that protects creators and rights holders. However, we strongly urge the government not to restrict the public's right to access what should be in the public domain.

Legal writers have urged that crown copyright reform is long overdue, not only in light of the CCH decision, but also in recognition of today's responsive federal government practice. However, crown copyright has been overlooked by all proposed amendments, long before 2005. Our position is that these materials be maintained as free resources and that the government consider funding a program of retrospective digitization.

This finally leads me to digital locks. They have been characterized as a digital threat to fair use, primarily because TPMs cannot distinguish between lawful uses and users. I wanted to draw your attention to the nature of the relationships we have with publishers and library users. At the forefront is not the issue of what our patrons choose to do with the materials they borrow, but rather the ability of commercial or government providers to capriciously lock down legitimately purchased materials. Libraries are now dependent on digital materials. Database providers or digital publishers often have exclusive rights to sell particular content, and libraries have a mandate to meet all of the research and educational needs of their users. It's rarely possible for us to purchase the same content from a competing vendor.

Our users want to be able to transfer content to portable devices for use in courtrooms, classrooms, and in the home, and users of legal information who are not affiliated with a library, such as self-represented litigants, members of the public, and some students—including lifelong learners—are being deprived of access to the law because of licensing restrictions. Such information, previously provided in book form on an open library shelf, now lies on the other side of a digital divide.

In conclusion, we just want to say that fair dealing is a user right, crown copyright is lost in the 19th century, as we see it now, and digital locks are both evil and good.

Thank you.

● (1105)

The Chair: Thank you, Ms. Hemmings, for your presentation.

We're now moving to our first round of questions, for five minutes.

Mr. Braid.

Mr. Peter Braid (Kitchener—Waterloo, CPC): Thank you, Mr. Chair. Thank you to all of the witnesses for being here this morning.

Ms. Hemmings, I'll start with a couple of questions to you. Thank you for closing by painting such a stark contrast for all of us.

Your organization wants to extend this notion of fair dealing. You want to turn it into a user right rather than an exception. I want you to elaborate a little on that. As you probably know, we want to focus our deliberations at this committee on technical amendments. I suspect this might be beyond a technical amendment.

Could you comment on that?

Ms. Mary Hemmings: It's our position that copyright is a good thing. We need to see copyright, because it needs to be a way to regulate the market, and we understand the commercial interests involved. However, we have to also recognize that libraries fulfill a specific function in the world. People and parliamentarians talking to each other will share documents. To have to pay a copyright fee to get it from office A to office B I think is reprehensible. It should be the right of anyone who owns a copy of that particular article to use it any way someone wishes to use it.

Looking at the issue of fair use as an exception, I find that rather reprehensible, quite honestly, because a user right is not an exception; it is a right. That is a positive thing rather than a negative thing.

Mr. Peter Braid: At a higher level, then, just elaborate on why the notion of fair dealing is so important for your organization, in your mind, and the broader educational sector.

Ms. Mary Hemmings: Again, we're going back to CCH, which recognized the fact that there is a different way of communicating, and we are part of the communication process. We facilitate a lot of this communication. To be hamstrung in terms of how we fulfill the needs of our clients probably has a lot to do with the fair dealing issue in terms of libraries and how we function.

The fair dealing clause has been I think very well articulated in this particular CCH decision. We like very much where it went, but we also feel that we are not competing with commercial interests. That is not our intent. That is not, in fact, what we're asking for. We're asking for the ability to purchase the materials, to license the materials, and to then distribute them according to how libraries communicate.

Mr. Peter Braid: Great. Thank you.

Mr. Swail, you provided the committee with some encouraging news about an increase in Canadian content in the textbook industry. I certainly welcome that. Could you explain why that's occurred? What's happening?

Mr. David Swail: Essentially, it's our way of responding to market demand. I'll speak a little bit about the higher education space.

Instructors and professors in the institutions we serve just find our Canadian-focused content far more relevant for their purposes, whether it's the case examples or something as simple as metric as opposed to imperial. They much prefer to teach from resources that are relevant and that speak directly to their students in a context they can understand.

As I mentioned in my comments, all of our opportunity has come from creating an original Canadian product for that market and from adapting foreign product when we can make minor modifications. The key is to really be able to teach and deliver to students with resources that speak directly to them and that are as relevant as possible. That's why the growth has been there and not in the imported products.

● (1110)

Mr. Peter Braid: On the issue of print versus digital, you indicated that 90% of textbooks are printed. Now, a digital version of a textbook is printable by the student, I presume. Is it not?

Mr. David Swail: It can be, yes, and we make that available to end-users as well.

Mr. Peter Braid: Given that, do you see that percentage split changing? Do you see the percentage of printed textbooks going down and the percentage of printed digital going up?

Mr. David Swail: We certainly do, and we've seen that already. We have a line of our business called Create, where higher education institutions can use a given textbook and excerpt specific parts of that product as they see fit for their particular purposes. They can do that digitally. They can do that in print.

I think what's important to note, though, is that as digital products have come along—and my example here shows you print bundled with an access card for digital product that complements and supplements this product—the price of that ultimate product hasn't changed. All of the investment we've made there has really been incremental value we're providing to the marketplace and not incremental revenue we're extracting as a result. We're trying to make ourselves more relevant at the same or a lower price.

The Chair: Thank you, Mr. Swail. We're unfortunately out of time.

Mr. Braid, that was well over five minutes.

Now we go to Mr. Cash for five minutes.

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

Thank you all for being here today. I particularly want to thank Mr. Swail for his overview of the textbook publishing industry and the importance of Canadian content. You should be congratulated for both your survival and your success.

Mr. David Swail: Thank you.

Mr. Andrew Cash: It also needs to be recognized that it's not just you, of course. You're hiring and contracting writers, photographers, designers, etc., and these are all small business people.

Mr. David Swail: Absolutely.

Mr. Andrew Cash: We want to create a climate where the sector is growing.

We understand that you have challenges around the transition to digital. Your point around the investments you're making in digital, even though the price is still the same, is well taken. It's something that not just this committee but Parliament going forward needs to consider.

I want to ask Ms. Hemmings about the issues around inter-library loans. What would libraries, archives, and museums have to do in order to comply with what seems to be very vague wording around taking measures to prevent X, Y, and Z?

Ms. Mary Hemmings: I totally agree that the wording on that is very vague. In fact it's quite disturbing, because we've never had to take that kind of extreme measure before. We've always taken measures to make sure that users are aware of copyright and cannot abuse the system. For example, we've put up signs around photocopiers saying they must be aware there's a certain obligation on the part of the user.

My concern is the policing role we're being asked to do, which I think is beyond what we've been doing up until now. It seems to focus only on digital resources. It's not telling us we have to follow the user to the photocopy machine and make sure they only make one copy. In saying that we have to do the same in a digital environment, it looks like it's been sort of stuck in there as an afterthought, quite honestly. The same principles should apply to print as they do to digital to ensure a good way of handling copyright material.

Mr. Andrew Cash: Can you spell out for the committee some examples of what may be required under this provision?

● (1115)

Ms. Mary Hemmings: On the public library level, to make it understandable for everyone from kindergarten to grade 12, and that sort of thing, you can borrow a book from the public library by downloading it to your BlackBerry—and then it's gone; you sort of borrow it for a period of time.

Technically, there are people who know how to get around a lot of these things, and that's where the issue of digital locks comes into play. There's no problem at all with borrowing a book in digital format for personal reasons. On what happens to it after it leaves the library...I cannot predict how a librarian will try to imagine some sort of technological way that someone will actually do that. Why they would do that, quite honestly, is another question.

Yes, you can borrow a book right now and make 500 copies, set up a booth on the street, and hope to make a commercial killing. But it's not likely to happen. The same goes for digital books that come out of libraries in that way.

Mr. Andrew Cash: I'd also like you to speak to the provision about using a digital copy for more than five business days from the day on which a person uses it.

Ms. Mary Hemmings: It's virtually impossible to regulate that one. We would need to have people trying to figure...or we would have to try to impose digital locks ourselves. I don't think libraries can possibly be doing that kind of thing. You can't follow a book out of a door and say you can only have it for five days. Imposing loan periods like that, depending on the institution you serve, may or may not be good. In some academic institutions a term loan is the norm, so you can have a bit of material for an entire term. I'm not quite sure where the five-day provision comes from.

The Chair: Thank you, Ms. Hemmings and Mr. Cash.

Mr. McColeman, you now have five minutes.

Mr. Phil McColeman: Thank you, Chair, and thank you to the witnesses for being here.

Ms. Hushion, in your original comments today you painted the background of your industry, the employment numbers, and the structure of the people you represent in what I would interpret as a doomsday scenario if this bill goes forward. Then it went to Mr. Swail, and I'll ask him the next question.

Is that what you intended to do?

Ms. Jacqueline Hushion: No, I said that's what's at risk. Potentially, if the bill passes with this proposed exception for education for fair dealing reversed—sorry, unamended—the industry will not disappear overnight. It won't happen. There will be a very slow and constant attrition. There will be less incentive, as David said, for investment. People will be more worried about their goods in the marketplace. Over the longer term—and I'm talking about maybe the first couple of years—we would see quite a bit of that. Over an even longer term, I think we would see Canada return to the position it was in 25 years ago, as a net importer of educational goods. As David said, we have a great success story.

I'm glad you asked that question, because I wanted to share one statistic that I think is fabulous, when you consider that we are joined —

Mr. Phil McColeman: Excuse me, I have limited time, and you've answered my question. Could I just leave it at that?

Ms. Jacqueline Hushion: Okay—we're 50% of the market.

Mr. Phil McColeman: I'll go to Mr. Swail next.

Mr. Swail, this market demand for Canadian goods—which is a great story that I think all of us, regardless of political stripe, love to hear—do you see it going anywhere? You say that it's an increasing demand, an increasing opportunity for you. You're obviously able to produce the products because of that demand, and you respond to market demand as a business, so what will happen to that demand in the event of a new copyright bill?

Mr. David Swail: Our principal concern is that, as currently worded, the definition of education is too broad. Our principal concern is that it would allow a much broader interpretation of how our commercial product could be used in an educational setting, in a way that perhaps undermines our opportunity to continue to sell that product. So it's about generating enough revenue to continue to reinvest in other disciplines, disciplines that are still principally U.S.-based, to be able to develop original product in some of those adjacent markets where we still rely on imported products mostly.

● (1120)

Mr. Phil McColeman: I think Mr. Nordal kind of hit it in his comments about certain categories of Canadian demand not being able to be served, but this would imply a subsidization of that category by your company. Is that correct?

Mr. David Swail: I'm not quite sure I follow the logic.

Mr. Phil McColeman: Okay. You're saying that the demand is there, but that you basically have to factor that into your business plan, your revenues, to be able to serve it—

Mr. David Swail: True.

Mr. Phil McColeman: —and so you're subsidizing it because there are fewer numbers perhaps.

Mr. David Swail: That's right.

Mr. Phil McColeman: The demand is there, but you're subsidizing it from other revenues.

Mr. David Swail: That's true. Undoubtedly in certain categories we have bigger markets to serve in the lower levels of post-secondary and introductory years, for example, bigger markets, higher enrollments. That's where a lot of our money is made, and it allows us to publish in more niche areas and in more senior levels where currently we import a lot more product. So it will allow us to expand up the value chain, if you will, within the higher education setting. It will allow us, critically, to reinvest in digital.

Mr. Phil McColeman: Your comments about digital, and the comments we've heard from other witnesses, are that we're on this threshold of huge opportunity, to be able to exploit that in terms of if we get copyright and allow people to do that.

The Chair: Mr. McColeman, 30 seconds.

Mr. Phil McColeman: In my view, having had a business background prior to politics, something comes along to fill a niche if you don't fill it. So it isn't doomsday; it's actually opportunity day.

Mr. David Swail: That's right.

Mr. Phil McColeman: I'll leave it at that.

The Chair: Thank you, Mr. McColeman and Mr. Swail.

Now to Mr. Regan for five minutes.

Hon. Geoff Regan: Thank you, Mr. Chair.

Are we going to be hearing from witnesses from the K to 12 sector —I guess that would be the provinces—at some point, do you know?

The Chair: We have our witnesses tomorrow.

Hon. Geoff Regan: They did the previous iteration of this bill last year.

The Chair: We have witnesses tomorrow, and then we'd have to look at—

Hon. Geoff Regan: Do we?

The Chair: Yes.

Hon. Geoff Regan: Thank you.

Let me turn to the question of fair dealing. Ms. Hemmings, you've heard the suggestion today from your fellow witnesses that the test ought to be the effect on the market. That should be the principal test, as apparently it is in the U.S. What impact would that have on you, do you think, and on libraries like yours?

Ms. Mary Hemmings: Again, going back to the whole notion of fair dealing, and certainly there was a consideration of that being tested in a commercial situation, I don't think we're arguing that this particular test needs to be dropped. Quite honestly, we're not in the business of putting our publishers out of business. We are in the business of exchanging the kinds of information that are not readily available among other libraries. To give you an example, there is a saying now, or there has been among librarians, that we're seeing the McDonaldization of libraries, meaning that all libraries are starting to buy the same thing. You can expect to see the same books and textbooks in one place as you can in another.

What distinguishes us are the unusual things that we buy because of our regional interests, our geographic interests, and also the interests of our specific users. For example, if I find out from another library that they wish to borrow a copy of an article written by Mackenzie King in the 1930s on employment and labour law, and very few libraries in my region are going to have that article, I want to be able to go into a database and be able to find that article and then flip it over to the borrowing library. That is fair dealing.

Hon. Geoff Regan: Thank you.

Ms. Hushion, let me ask you, do you see a distinction to be made between textbooks that are published for a limited market and other texts when it comes to the educational market?

Ms. Jacqueline Hushion: Do I see a distinction in terms of their importance or a distinction—

Hon. Geoff Regan: No, in terms of how they're treated when it comes to copyright and the education sector.

Ms. Jacqueline Hushion: There shouldn't be. That seems to be most inappropriate. I don't know why that would be the case.

An example is some work that Mr. Nordal's company has just done on aboriginal business and books written for that community to help them grow skills in the business community.

● (1125)

Hon. Geoff Regan: Let me ask you then, would the effect on the market test, do you think, mean that a court would probably find there would be much more effect on a market for a book or text like you just described if there are some copies made, or copies made of a portion of it, as opposed to something that had a much wider distribution?

Ms. Jacqueline Hushion: Potentially, yes. As Mr. Swail said, that's a niche market, it's a small market, and if you've got the return on investment from your legacy materials that allows you to invest in things like what I've just described Mr. Nordal's company doing, that's great. If you start losing, if you have erosion of that legacy market, then you're not going to be able to invest in those important niche markets, many of which relate to the various peoples of our country, and languages, and outlying areas where distance education may be the only way, and not even make it there.

Hon. Geoff Regan: Thank you.

Ms. Hemmings, you talk about digital locks. Your view appears to be that if you've paid once for something, you ought to be able to use it in other forms, or formats shift, as we've heard.

Ms. Mary Hemmings: Yes.

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

Hon. Geoff Regan: I think the phrasing you've used is that you ought to be able to do this for any uses that qualify under fair dealing.

Ms. Mary Hemmings: Correct.

Hon. Geoff Regan: Would that be different from saying that you could use it for a non-infringing purpose? Do you see a distinction? Is that an issue for you?

Ms. Mary Hemmings: A non-infringing purpose, yes. We wouldn't necessarily support an infringing purpose.

I'm not sure what the question really is.

Hon. Geoff Regan: Sorry, what I mean is if the rule would be that you're allowed to circumvent for a lawful purpose, for a non-infringing purpose, is there a distinction between that and what you're suggesting?

Ms. Mary Hemmings: It goes back to our relationship with our publishers, if our publisher would allow a licence to do that sort of thing. The lock is there for a reason. We have to know what the contract obligation is for that lock and if that contract obligation is not something that we can live with, then certainly we wouldn't do it. But again, we're looking at the lock as a contract.

The Chair: Thank you, Ms. Hemmings and Mr. Regan.

That's the end of our first round of questioning.

Now we go to our second round of five minutes each.

Starting us off is Mr. Armstrong.

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

I want to thank our guests for their testimony today.

Mr. Swail, I want to start with you. You talked more about higher education. Is that because from K to 12 you have more of a niche market and you're still able to market your goods under today's market constraints?

Mr. David Swail: In reality we decided that I would focus on that part of the market and Mr. Nordal would focus on the K to 12 sector, but there are significant differences from a digital perspective, which we can address if that's of interest.

Mr. Scott Armstrong: Okay. Maybe I'll direct it to Mr. Nordal then.

Today's classroom and K to 12, that's my background, and that's why I want to focus on it.

Mr. Greg Nordal: Sure.

Mr. Scott Armstrong: The classrooms in Canada are far different from what they used to be. Most baby boomers learned under a basal reading program. People remember those, but things have changed a lot. I'm going to argue that they've changed a lot because of who's in the classroom. We have a much more inclusive environment. It's much more heterogeneous.

Mr. Greg Nordal: Sure.

Mr. Scott Armstrong: We have varying ability levels. We have a lot of immigration. We have a lot of ESL concerns. So a teacher in a K to 12 classroom, particularly at the elementary level, could have a reading level in a grade 6 class from grade 2 all the way to grade 8, and they have to be able to meet those demands. What have you done to capture that market and provide resources that meet today's demands?

Mr. Greg Nordal: I think the more we do in the world of digital, the more we would help that situation. If you have an access code, for example, you could have access to a classroom. So a science teacher might find a remedial learning opportunity if the language skills aren't appropriate for the actual science material. They can digitally use their access codes, go back a few grades, and help the kid come up to speed. But understand that very few classrooms in Canada are equipped to go fully digital, that is, without textbooks. I wish they were; it would be fantastic. As educational publishers, we've invested millions, collectively, to get ready. The K to 12 sector is struggling to finance this. There are issues of equity, access, and hardware.

Mr. Scott Armstrong: The new schools being built all over the country are ready for this. They're technologically superior, most of them. I was principal of a school in Nova Scotia, a new school, that could handle almost anything you could send us. I was also principal of a small rural school. You have to meet those diverse demands, just as a teacher has to meet diverse demands in her classroom.

Mr. Greg Nordal: Correct.

Mr. Scott Armstrong: With all these changes going on, and all this diversity in the classrooms, how do you see the protections in C-11 for digital media? Is that going to help or hurt you? Where do you see it going?

● (1130)

Mr. Greg Nordal: There is a wide range. I think the solutions for many years to come will be of a hybrid kind, increasingly digital but with a mix of text. On the development side, the costs attached to developing a learning resource come to hundreds and hundreds of thousands of dollars. The cost of printing a book and binding it is probably 10% to 12% of the actual cost. The cost is in the digital, in the content development. When it goes digital without adequate protection, it could be subject to illegal reproduction. You don't have to use a photocopier—it's a click of a button. It's easily dealt with. Digital locks help that situation, but very little of this is finding its way into the classroom today.

Mr. Scott Armstrong: But this is coming. Schools are going to adopt much more digital stuff, because there's a need to. Print costs have driven textbook costs up so much, and you have to provide so many different resources for each classroom.

As a principal, I'm always looking to provide economical digital resources that meet the demands of a diverse classroom. No longer would I need to have a whole classroom set of *Charlotte's Web*, for example. I might need to have a classroom set where I have a high interest level at a low reading level for weaker readers. I might need to have some additional resources for my more advanced children who might be beyond that reading level. You're providing all that. The best way to provide me the resources I can use in my school is digital. Is that accurate?

Mr. Greg Nordal: We're so far away from digital that it's only accurate to a point. Less than 10% of K to 12 today, by my estimate, are equipped to use digital. I have talked to schools that are very equipped. We've done pilots in schools. We've learned a lot about some of the challenges—access via WiFi, the hardware. It's not a panacea, and it is not short-term. It's definitely going that way, you're correct. But it's years away.

Mr. Scott Armstrong: Copyright legislation is going to go on for years, so we have to write legislation today that is going to meet those challenges for tomorrow. Is that correct?

Mr. Greg Nordal: We have to meet challenges for today as well as tomorrow.

Mr. Scott Armstrong: Thank you.

[*Translation*]

The Chair: Mr. Nantel, you have five minutes, please.

Mr. Pierre Nantel: Thank you, Mr. Chairman. I am going to try to be as concise as my colleague.

My question is for the representatives of the Canadian Publishers' Council, and for the representatives of the Canadian Educational Resources Council. Clearly, publishing is akin to managing a book, and not an author. You have to ensure that the work is publicized, read, that people are aware of it, and that it is distributed to all markets.

I would like to make sure of your position with regard to persons with perceptual disabilities such as visual impairment or blindness. What work is being done with regard to digitizing books for these people?

[*English*]

Ms. Jacqueline Hushion: Actually, I sat for five years on the federal council on access for the visually impaired, and our association has been very involved in pilots. We're doing one right now in the province of Ontario—six universities, two community colleges, and five publishers—and hopefully that will be exploded out to all publishers and all institutions within Ontario.

We're doing everything we can to facilitate, in print and in digital, rapid access to content for the student. The complaint has always been that the available intermediaries didn't get the information to the student before the course had begun, and in some cases they were at exam time. We're working on this, and so far we appear to be having some luck. Those students seem to be quite pleased.

You should know that the World Intellectual Property Organization is really hoping to push forward with an international treaty that will address this very issue. I'm involved with that as well. If Canada ratified that treaty, it would obviously move things along.

The last thing is that there's a new project now, called the TIGAR project, and Canada will be involved in it. The purpose of the project is to move files across borders. Transborder data flow is a big issue when you're talking about intellectual property, because people don't want their property just "out there", so to speak. It's a very big issue. There are worries about infringement and piracy, etc. But as long as the files are already converted, to be used for students as opposed to the general public, and students know how to use those files, there is some safety there.

So with the security measures built in, it'll be fine. The Americans are in the TIGAR project, we're in it, the U.K. is in it, and so are South Africa, France, Belgium. I mean, we've really just begun, but there is a tremendous amount of work being done.

It's unfortunate that there appear to be a lot of initiatives under a lot of umbrellas, and there's not yet any evidence that all of this will coalesce. That's what we really need. The TIGAR project may do that.

● (1135)

Mr. Pierre Nantel: So that's really what Ms. Hemmings was saying about the evil and bright sides of TPMs. I guess you are involved in these discussions too, with this.

Ms. Jacqueline Hushion: Of course.

Mr. Pierre Nantel: Would you, Mr. Nordal or Mr. McIntyre, have anything to add to this?

Mr. Greg Nordal: Yes.

We support a number of institutions. If a visually impaired student wants the materials, we provide them through our repository, centrally managed. Certainly a lot of our digital products—there are very few of them in use today—have audio components for the hearing impaired, for example, or for the sight impaired. They can actually hear the audio books built right into our digital text.

It's a very small usage, but we've done a number of things to respond. We've worked with a number of other agencies. I think the educational publishing community has done a very good job supporting the visually and hearing impaired.

Dr. Gerry McIntyre: Just by way of supplement, the exception for the print disabled is the classic paradigm of what an exception can be, because it is specifically defined for an identifiable group.

The Chair: Monsieur Nantel, you have 15 seconds.

Mr. Pierre Nantel: Okay. I'll let those 15 seconds go.

The Chair: Thank you, Monsieur Nantel.

Mr. Moore, you have five minutes.

Hon. Rob Moore: Thank you, Mr. Chair.

Thank you to our witnesses.

I don't recall from your opening, Ms. Hemmings, if you also represent law school libraries.

Ms. Mary Hemmings: I do, yes.

Hon. Rob Moore: Okay.

Thinking back—and it wasn't that long ago that I was in a law school library quite regularly—the protections we had then against unlawful copyright was that there was a photocopier there, but the price per page was prohibitive. You wouldn't necessarily stand there and photocopy a book.

Now we have a whole digital age when...aside from the fact that no one I went to school with would ever think of doing that anyway.

Ms. Mary Hemmings: Right.

Voices: Oh, oh!

Hon. Rob Moore: But now, in this digital age, something like that can be done with the click of a mouse.

When you were summing up in your remarks, you used pretty strong terms when you mentioned that digital locks were “evil and good”. I know that in your context, law libraries, you're dealing with some very expensive material; a great deal of work goes into the production of that material.

Can you give us both sides, the good and the evil, as you see it, of digital locks?

Ms. Mary Hemmings: I'll talk to you about this from an academic law school library perspective, because that's what I'm most familiar with.

Currently, we subscribe to Canadian e-books called *Essentials of Canadian Law* from Irwin Law Inc. We buy the print books and put them out on the reserved shelves, and we also have the e-books. The e-books are very popular among the students because they can all access them. There isn't just the one copy on contract law. They are preparing an assignment, and they can all access it, and that's not a problem. The problem—the evil problem—is when you enter into a licence or a contract with a distributor and find that the rules are so restrictive that you can't even possibly comply with the needs of the users.

For example, I recently bought a U.K. e-book from England. It came in on a particular platform. I was going to print one chapter for the benefit of one faculty member who wanted to read it not on the screen, but wanted to read it in print. I knew that one chapter was a perfectly allowable thing to do. I made a mistake and I printed off the wrong 20 pages. I was locked. I could not get back in there. I could view the chapter, but I couldn't print it for the benefit of the faculty member. I had to call him into my office so he could read it from my screen. That's how evil these digital locks can be. They can be very good in terms of regulating how materials are used; yet, at the same time, they close down what we see as our traditional ways of people being able to communicate in a scholarly fashion.

● (1140)

Hon. Rob Moore: Okay.

Judging from the comment you're making, another word for evil in the situation you cite is “effective”, right?

Ms. Mary Hemmings: Right.

Hon. Rob Moore: It was an effective lock. It did not allow someone to circumvent it. In your case, there was a mistake made. Those are some of the challenges we have in dealing with these locks.

Do you think it's a matter of degrees? Is there a way the line could be pushed one way or another to accommodate protection of the copyright material, but also accessibility for the purchaser?

Ms. Mary Hemmings: Absolutely. I think the TPMs provide an opportunity for the library community to be able to negotiate how they want to use their materials. On the other hand, we have to remember that we're kind of used to using print materials. We've been so pampered by print. You can take a book home and, as I said, make 400 copies of the latest best seller and set up a little booth on the street. That is not fair. That's not right and not fair, and probably not very economically feasible for the individual who is doing that kind of thing.

I think what I'm trying to say is that libraries are not in the business of policing how people use the materials they want to borrow. I think that is our biggest concern.

The Chair: You would have to do it under Mr. Moore's time, which is five seconds.

Hon. Rob Moore: I can't beat that. Thank you.

The Chair: Thank you, Mr. Moore.

We will now move on to Mr. Dionne Labelle *pour cinq minutes, s'il vous plaît.*

[*Translation*]

Mr. Pierre Dionne Labelle: For many stakeholders, the fair use of a work for educational purposes seems to be an irritant, and some feel that there is a lack of precision with regard to what is fair in that situation. Several observers expressed concerns with regard to the application of this clause.

I tried to imagine its potential repercussions, which are not known to us now. In fact, there are several consequences linked to that provision which are not known at the present time.

So let's imagine that I am a professor of film at a university and that I have a digitized book in my possession which I purchased from this lady, which analyzes the disastrous repercussions of the exceptions to copyright introduced by the Conservatives. I decide to communicate with my students through a website, and on my website, I put three chapters of this book. I go and rent the movie *Good Cop, Bad Cop* because I also want to evaluate, in my course, the importance of Quebec culture in Canadian identity. I download this material on my website for educational purposes only, of course. Then I order a digital book from the library and I add it to my website. Now my students have access to all of this material and it seems to me that I have done nothing wrong.

However, in the first two cases, I have done something that is prejudicial to the commercial rights of these works. Do you think that these situations could be possible? You can imagine the losses that would be incurred if all professors started to use digital technologies. To my mind, this bill, with regard to the exemption, is not sufficiently clear: we don't know what is allowed by the law and what is not.

Everything I would do in that case would be digital and would be allowed thanks to the exemption we are discussing, and this would be prejudicial to you financially, is that correct?

Moreover, I would have to destroy my notes after 30 days. Since I borrowed the material from the library, after the 30-day period, I would not only have to destroy my notes, but my students would have to do so as well. What an incredible scenario, and yet it is possible!

What do you think, madam?

● (1145)

[*English*]

Ms. Jacqueline Hushion: I agree. We understand exactly where you're coming from on the 30 days.

Yes, you're right, in the first two instances you would have infringed because you took the whole work.

We are not opposed to fair dealing. We already have fair dealing in the act for a number of purposes. All Canadians benefit from it. Publishers benefit from it, and their authors and researchers benefit from it. What we are opposed to is an exception that is ill defined and unstructured, and we want clarity around the exception. We're not saying take it way; we're saying clarify it.

I have given our joint proposed amendment to the clerk. I did that as we came in.

We believe that in looking at the government's backgrounder and comparing it with what the education community says the reality will be, which is not a great increase in free uses, and combining that with clarity should mean that the government meets its objective: that the education community is still well served, even though there is now some further definition around that exception; and that publishing—I'm not going to say it cures everything—at least has a good chance, a fighting chance, to increase the proportion of its works that are original indigenous Canadian works in education, as opposed to more of the U.S. and the U.K. coming into Canada.

[*Translation*]

Mr. Pierre Dionne Labelle: I know that you smiled, Mr. Nordal, during my case study, but these are situations that could arise if the exemption regarding educational purposes is not made more specific.

[*English*]

Mr. Greg Nordal: Absolutely, and that's exactly what we're looking for. It's troublesome, it's well-intended, and we get it. We support the need for an exception, but as it's currently written, it's the promise of ongoing litigation and uncertainty for publishers. We employ thousands of Canadian authors. It takes a lot of time and talent to create a textbook like this.

This is strictly Canadian. I notice it's got a picture. I hope I paid permissions on this. I'm looking at it up there, by coincidence

Voices: Oh, oh!

Ms. Jacqueline Hushion: I hope so.

Mr. Greg Nordal: It's a risk that people will no longer take, and in many cases the amount of margin in a small market, where we have to compete with fellows like Mr. Swail here, who is a fierce competitor.... It's a very small market, and we know if we don't get 50% or 60% of the expected market, then it's a non-viable equation. If some portion of that is syphoned off and reproduced, that is a serious problem.

The Chair: Thank you, Mr. Nordal.

Merci, Monsieur Nantel.

Up next is Mr. Calandra, for five minutes.

Mr. Paul Calandra: Thank you, Mr. Chair.

I just want to ask more of a process question. When you've created a program, you're not selling to each individual school, right? Are you selling to the boards of education or to the ministries of education?

Mr. Greg Nordal: It will vary by project. In some boards it is the board that will make a decision on a board-wide basis. In many cases it's school by school, and on custom projects, on which we do a lot of work, smaller provinces—for example, Newfoundland or P.E.I. will want a very specific text—will actually commission on a custom, one-time basis. It can be at a province level, it could be at a board level, and it could be at classroom level.

The majority market is a classroom-by-classroom situation.

Mr. Paul Calandra: When you're doing classroom by classroom then, when you're being contracted to do this, does that not afford you much greater ability to really put into contracts how your works will be distributed, how many books you'll be creating, or if it's digital...? Just explain to me why you can't protect what you're doing in the contracts you're making, say, with an individual school or even with the school board.

Mr. Greg Nordal: Sure. For example, Ontario will come up with a curriculum requirement in science. We'll decide whether or not it's a viable business case. Science is very expensive. There are a lot of digital assets, photo images, and so forth. We'll invest *x* hundreds of thousands of dollars, as will our competition. In the province of Ontario, in most boards it's open, school by school. We will go to those schools, but once it is sold it is literally sold to a principal or a committee within the school or a school teacher.

For what happens afterwards, we have no control. It's not as if we have any interest, ability, or desire to monitor what goes on in the classroom, and very well-meaning educators, if they are in a pinch and don't have enough classroom sets or if they get destroyed or lost, will make copies.

There are licensing opportunities. Roughly up to 10% of any book can be photocopied under licence right now, under current legislation. That's fine. As I mentioned, in 2009, the last year for which I have statistics, there were over 300 million pages alone photocopied for classroom use. Most of that, I assume, is done under licence and so forth, but under the current exemption, the way it's written, I don't believe that licence in the eyes of many would be required any further and that 300 million will be much larger, and I fear there will be zero compensation for that kind of activity—and no, we do not have any control once we sell a textbook into a classroom.

There is not a lot of understanding among classroom teachers of what is appropriate. It's not a simple subject, as we're all discovering as we look at copyright.

● (1150)

Mr. Paul Calandra: Can you use technology in how you're doing this? Presumably there is a digital copy of everything you are doing. Can a text not be associated with a digital copy?

Mr. Greg Nordal: They often are. What is happening more and more is hybrids. What's going on with the amount of digital sales in K to 12, notwithstanding the obvious progress that's being made, is literally minuscule, and based on current funding for schools for hardware, infrastructure, and getting the teachers up to speed, we are many years away from digital being the answer, and even then, I'm not sure the printed book won't have its place. I believe it will for some time.

Digital alone is absolutely not really all that helpful in the medium term.

Mr. Paul Calandra: I hear what you're saying. I'm just trying to get a handle on why each printed copy cannot.... Can a digital copy not be created? For instance, if you're selling it, can't it be a digital copy? It's not very expensive to create a digital copy, but every digital copy comes with a printed text so that your work is protected. You're selling the digital copy, but it happens to come with a text.

Just explain that one.

Mr. Greg Nordal: That happens today all the time. We'll sell an e-book that goes with that printed text. You could somehow prevent just sending out 300 copies through some digital mechanism, but what mechanism is there to prevent photocopying half of this particular book? I am not aware of any mechanism to do that, other than the fact that current law says it is not appropriate, and people respect that.

Mr. Paul Calandra: What you're selling is the digital copy, and the digital copy is protected. So if you go to a school with 300 students, they are getting 300 digital copies. This is why I'm not understanding why you can't protect—

Mr. Greg Nordal: Part of the answer is that we don't actually sell floppy disks or CDs. It's web access, right? That's how it's done now. It's not a suite of copies.

The Chair: We're well over time already.

Thank you very much, Mr. Nordal and Mr. Calandra.

Now we go to Mr. Benskin for five minutes.

Mr. Tyrone Benskin (Jeanne-Le Ber, NDP): Ms. Hemmings, I'm kind of curious about the archival nature of law books, in particular, and how the digital age is affecting you. I had the pleasure of making a presentation at the Supreme Court last week, and in the rooms they were showing me, I was looking at law books from the 1860s.

What's happening in the realm of digitization in terms of archival books? I'm sure that the new ones come in e-format as well as in hard copy. What's happening with those?

Ms. Mary Hemmings: I touched a little bit on that in my presentation, saying that there are things in the public realm under crown copyright that are outside or past the digital divide, if we want to call it that. There are countries, such as the U.K., that have massive digitization projects. Australia is doing that sort of thing. They are doing past legislation and past parliamentary materials under crown copyright on a huge scale. These are, of course, searchable.

You know as well as anyone who deals with parliamentary materials how important progress in statutory research is, and similarly, how important a treatise is. A commentary on the law from 1840 something can be as valid now as it was in the past.

There are commercial interests that are producing this on grand scales, and libraries pay for them very happily. These are the sorts of materials—a particular portion of a book—that a rich academic law library will lend to a poor member of the CALL association. It could be a law society. It could be a court house. That's how we are now talking to each other. That's the sort of thing that's happening.

In terms of what's happening here in Canada, we're not going fast enough in terms of digitization.

● (1155)

Mr. Tyrone Benskin: Thank you.

I just want to jump over to our two licensees or licensors. A couple of times it's been put out there that it's a doom and gloom scenario, that we're going to disappear...and things of this nature. What I'm understanding is that what you guys are looking for is clarity so that you can do the job you're doing now and do the necessary transition. We heard from Audio Cine and Criterion, which have invested huge sums in the digitization of the work.

For you, clarification of the exception, or fair dealing, with regard to education is what you're looking for, as opposed to anything else. Am I correct?

Mr. Greg Nordal: Yes, that is correct. Right now it's far too open to interpretation. We literally have customers today, literally today, who are walking away from our existing licence agreements because they believe that Bill C-11 will make these materials free. They are asking why they would sign a licence agreement. That is today.

Mr. Tyrone Benskin: We did hear that from Criterion and Audio Cine as well. They've lost a significant number of licensees because of that.

Mr. Greg Nordal: We've had over 30 universities and colleges walk away from licensing in higher education right now. There are 30. The two universities that signed recently—U of T and UWO—are being absolutely criticized and assailed in the media, vilified, for doing this. They are being asked if they understand that Bill C-11 will make this much easier and cheaper to access. That's why it offends me to suggest that this isn't going to have an impact on our market. It's happening today.

Mr. Tyrone Benskin: What kind of fix do you think you would be looking for with respect to clarity that would make you comfortable?

Ms. Jacqueline Hushion: What we need is to....

Mr. Greg Nordal: Let me help you. We specifically put in a request for an amendment. You have that amending language that specifically says that if it has an adverse impact on the market, it is not fair dealing. That's the confusion.

I'll let Jackie give you the better answer—

Ms. Jacqueline Hushion: That's okay.

Mr. Greg Nordal: —but fair dealing and free dealing are two completely different things.

Mr. Tyrone Benskin: The question I'm going to ask you, though, is how you tell that in advance.

Ms. Jacqueline Hushion: How do you...?

Mr. Tyrone Benskin: How do you tell about the adverse effect?

Ms. Jacqueline Hushion: The assumption is that people will recognize when there is an unfair dealing. If there's an exception in the Copyright Act to do something with this, an existing exception, then you use that exception. You don't use this exception plus default to fair dealing to use more exceptions. You have to use the exception that is relevant to your work.

The Chair: Thank you, Ms. Hushion.

Sorry, Mr. Benskin. We're over time.

Ms. Jacqueline Hushion: It's measurable.

The Chair: We'll go to Mr. Lake for the last five minutes.

Mr. Lake.

Mr. Mike Lake: Thank you, Mr. Chair.

Again, thank you to the witnesses for coming today.

My first question is to Mr. Swail and Mr. Nordal.

On the CCH decision regarding the six factors, did the Supreme Court get it wrong?

Mr. David Swail: I'll let Greg jump in as well, but I think the CCH case was a very specific case about a very specific kind of content with a very specific role that the publisher played in that instance.

Our concern with CCH is that it does not make the primacy of the market first and foremost. In fact, it quite blatantly states that "fair" isn't really defined by the commercial impact on the work. For us, that's absolutely antithetical to the notion of copyright: how can it be fair if it undermines the commercial prospects for the work? We just don't understand that.

That's why we feel CCH does not elevate the marketplace to the first priority.

Mr. Mike Lake: Just before I come to Mr. Nordal, you stated that they said "fair" is not defined by the value of the work?

Mr. David Swail: They said that the commercial prospects for a work can be harmed, and it can still be concluded to be fair.

That's what we feel—

● (1200)

Mr. Mike Lake: Because of the six factors, it asks if the copying of the work will affect the marketing of the original work. The quote is the following:

> Although the effect of the dealing on the market of the copyright owner is an important factor, it is neither the only factor nor the most important factor that a court must consider.

Mr. David Swail: Precisely.

Mr. Mike Lake: It doesn't say that it's not a factor.

Mr. David Swail: But in our view, it is the most important factor. That's really what our amendment would propose.

Mr. Mike Lake: So for the example that I believe Mr. Nordal gave about copying half of the book and giving it to the entire classroom, it seems to me that when I read the factors here, at least five of the six factors would come into play. Now, the character of the dealing talks about a single copy or multiple copies, so there's one. Both the amount of the dealing and the importance of the work allegedly infringed are to be considered, so the amount of the dealing would come into play there.

With regard to alternatives, is there a non-copyrighted equivalent of the work? Well, there is not, so that would come into play. On the nature of the work, if it has not been published it may be more fair. Well, it has been published, so that would come into play in the effect of the dealing on the work. We're talking about five of six factors coming into play.

It sounds as though Mr. Swail would want to wipe out four of the five and just have the one factor.

Mr. Greg Nordal: If Bill C-11 goes through unamended, we're actually inviting this as an exception.

It will confuse. It already is confusing, as I mentioned to folks, today.

When you think of the CCH ruling, the Copyright Board and the Federal Court of Appeal have both said that what's happening with multiple classroom copies is not fair, and that is now going to the Supreme Court. That's eight years of litigation.

One might say, well, what is eight years of litigation? Well, in the digital age and with the amount of investment we make, that's a lifetime. That's a lot of curriculum that may not be supported. That's a lot of investment dollars. That's a lot of authors not sure whether they should do the actual work.

Even since CCH, we still have the Federal Court of Appeal ruling on what is fair. It's still out there, notwithstanding CCH. We don't know where that's going to go. If you include fair dealing for education as an exception, to me that's an invitation, and it will clarify in the minds of tens of thousands of school teachers, who will say, “I guess it's okay now.”

Again, we already have—

Mr. Mike Lake: But the courts have said it's not.

Mr. Greg Nordal: Have they?

Mr. Mike Lake: They have. When you look at the six factors, the court says that it is not.

Mr. Greg Nordal: The Supreme Court is hearing it yet again on education.

Mr. Mike Lake: There are always hearings going on to clarify even more. I mean, that's part of due process as we go through the process.

Clearly, when you look at the six factors, it's pretty clear that the examples that are given time and time again before the committee are not actually fair dealing.

Mr. Greg Nordal: I find that of little comfort. It's certainly not the comfort that is provided in other jurisdictions like the U.K. or the U. S., which is often quoted as an example. Why would there be an issue? Again, if it's not an issue for the educational sector, as they have said in various representations, we would respectfully ask that that be reflected in the actual language.

They don't indicate that they have an issue with it; therefore, let's ratify it under law.

Ms. Jacqueline Hushion: If you believe that the primacy of the marketplace is important to this industry and it needs to be cited, then cite it in the law. We would like to see the government make the legislation. We want—

Mr. Mike Lake: But that's not the way fair dealing works.

Ms. Jacqueline Hushion: But we don't—

The Chair: We're also over time, so please wrap it up.

Ms. Jacqueline Hushion: We don't want the justice system to have all of that in its hands. We want it in the hands of our legislators.

The Chair: Great.

Thank you, Ms. Hushion and Mr. Lake.

I'd like to thank the witnesses for being here today.

Could the committee members give me 30 seconds of their time?

Thank you again for presenting. Your testimony is very important to this committee.

Members of the committee, tomorrow there are votes at 5:30. We had two sets of witnesses, one from 3:30 to 5, and then another from 5 until 6:30. Through the great work of our clerk, we've been able to change that to have the meeting from 3:30 to 5:30 with all four witnesses here at the same time.

Also, just a reminder that the meeting is on Wellington. So when the bells ring at 5:30, we have the half hour to get from Wellington into the House of Commons.

With that, we will adjourn this meeting. Thank you.

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