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Chair

Mr. Dan Ruimy

Standing Committee on Industry, Science and Technology

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● (1555)

[*English*]

The Chair (Mr. Dan Ruimy (Pitt Meadows—Maple Ridge, Lib.)): Welcome, everybody, to meeting 140 as we continue our five-year legislative review of the Copyright Act.

A voice: It's been a long study.

The Chair: It's almost done. We're down to the wire on this study.

First off, we have some folks with us today. Unfortunately, we couldn't be here earlier. We had votes and that seems to take precedence over anything else.

With us today we have, as individuals, Jeremy de Beer, Professor of Law, Faculty of Law, University of Ottawa. We have Marcel Boyer, Emeritus Professor of Economics, Department of Economics, Université de Montréal. We have Mark Hayes, Partner, Hayes eLaw LLP, and we have Howard P. Knopf, Copyright Lawyer. Mr. Knopf is Counsel at Macera & Jarzyna.

All right, we have lost half an hour. You have up to seven minutes. Less is better, it gives us more time to ask questions. We do have another committee meeting here at 5:30.

Why don't we start with Mr. de Beer? You have up to seven minutes.

Professor Jeremy de Beer (Professor of Law, Faculty of Law, University of Ottawa, As an Individual): Thank you very much, Mr. Chair and committee members.

My name is Jeremy de Beer. I'm a law professor at the University of Ottawa and a member of the Centre for Law, Technology and Society, but I'm appearing here in my individual capacity.

I offer this committee only my own views, but based on my experience as a former legal counsel to the Copyright Board of Canada and adviser to the Copyright Board of Canada, as well as to collecting societies, user groups, government departments and international organizations. For over 15 years I've designed and taught courses on copyright, argued a dozen cases on copyright and digital policy before the Supreme Court, and published extensively in this field.

I'd like to specifically mention just two of my recent articles commissioned by the Government of Canada. One was a widely cited empirical study on the Copyright Board's tariff-setting process, which I did for the Departments of Canadian Heritage and what is now Innovation, Science and Economic Development Canada. The other was a thorough review for ISED on methods and conclusions from evidence-based policy-making. I cite these studies to emphasize that my views aren't based on the special interests of certain industries or mere speculation, but on rigorous research that I hope will help this committee make some well-informed decisions.

It's my third appearance in about a week before a parliamentary committee. Last week my testimony to the Senate's Standing Committee on Banking, Trade, and Commerce focused on proposed reforms in Bill C-86, the budget implementation act, to the Copyright Board and the collective administration of copyright. Yesterday, I testified to the Standing Committee on Canadian Heritage for its study on remuneration models for artists and creative industries, which will feed into this committee's review of the Copyright Act.

I won't repeat that testimony, but I would like to highlight the most important points. First, as I told the banking committee, the resources and proposed reforms to the board and collecting societies are on the whole good, but there remains some important work for this committee to do on a policy level. To the heritage committee, I made the point that if artists have remuneration problems, the root cause may not be copyright at all, but rather power imbalances and unfair contracts with publishers, record labels and other intermediaries. I said that if the government wants to expand anyone's rights, it could start by recognizing and affirming that copyright doesn't derogate from indigenous people's rights over knowledge and culture.

I think most importantly that whatever the heritage committee and this committee recommends must take account of the dramatic extension of copyright protection in Canada's most recent trade deal with the United States and Mexico, the USMCA.

With that, let me turn to the statutory review of the Copyright Act that this committee is mandated to do. You do not have an easy task. I've seen the 100 briefs already submitted, and the list of 182, and counting, witnesses you've heard from. Here's what I take from all of that. It's much too soon since the last round of amendments to consider any major overhaul of Canadian copyright law. In my view, the most important recommendation this committee can make is to get off the hamster wheel of perpetual copyright reform. lt's not just pointless. It's counterproductive to reopen the act every five years, as section 92 currently requires. Just looking at the list of special interest groups coming to you cap in hand makes one's head spin.

The act was modernized. That was the word, it was the "modernization" act in 2012. Before that there was a massive expansion of copyright in 1997, and before that in 1989. How can anyone credibly claim to have evidence on whether the last batch of reforms is working or not? How can anyone say with a straight face that the act is already out of date again? These frequent reviews aren't free. There are cash expenses, there are opportunity costs, you could be focusing on other things, and most importantly, there are big policy risks.

To be clear, I'm not suggesting that copyright is unimportant. To the contrary, it's a crucial issue. My point is that we need, and we have, technologically neutral principles, and we need the time to properly implement and interpret, in practice and by the courts, and then consider the principles before giving lobbyists another kick at the can.

● (1600)

When it is seen in that light, I think it becomes easier to discount a lot of the rhetoric and the recommendations around—to list just a few examples—statutory damages to coerce educational institutions into buying licences they may not need or want, website-blocking schemes or special injunctions to give copyright owners more procedural powers than other plaintiffs have, iPod or Internet taxes or other cross-subsidies, and on and on and on.

That said, there's one very recent game-changer that I think this committee should consider, and that's the dramatic expansion of copyright required by the USMCA. The USMCA will give copyright owners an additional two full decades of monopoly. Copyright in Canada will soon last for the life of an author plus 70 years. On average, if you look at life expectancy, that's 150 years—a century and a half—that we have to wait to freely build on and embellish works in the public domain.

I understand why we did that. I'm a pragmatist. If that's what it took to salvage free trade in North America, all right. However, what it means is that Canada has now aligned the term of protection of copyright with that in the United States but not the safety valves, like fair use, that are so crucial for driving innovation. Without counterbalancing measures to align Canadian and American copyright flexibilities, Canadian innovators would be at a huge disadvantage.

In light of the time, let me conclude with my general point on this. For the theory of free trade in copyright-protected works to function in practice, both the floor and the ceiling of protection have to be harmonized. We can't take just the bad of American law without taking the good, so my recommendation above all for this committee is to ensure that in any measures it takes, it consider the changes that USMCA will bring in its report.

Thank you very much.

The Chair: Thank you very much.

[*Translation*]

Mr. Boyer, over to you. You have seven minutes.

Mr. Marcel Boyer (Emeritus Professor of Economics, Department of Economics, Université de Montréal, As an Individual): Thank you very much for the invitation.

Conflict exists between creators and users. Obviously, creators want to benefit from the value their creations generate for users. Users want to minimize payment for such inputs in order to channel savings towards other means of reaching their goals, their objectives or their mission. We have two particular examples before us: replacing copyright payments with scholarships or other services for students, or investments in broadcasting facilities in smaller communities or markets.

Is this a standard conflict between buyers and sellers? The answer is yes and no, and I will explain why. As I am an economist, I am going to talk about what economic efficiency or optimality tells us about this conflict.

● (1605)

[*English*]

Copyrighted works have two characteristics. First, they are information goods, or assets—I'm going to say that—which means that once produced or fixed, their use or consumption does not destroy such goods or assets. They remain available now and in the future for consumption by other people. That would be different from the standard public goods, which have to be produced every year, things like national defence or public security, for instance.

The second point is on digital technologies. What exactly they have changed in the world of copyright is that they have reduced to zero or almost zero the cost of reproducing and disseminating copyrighted works—whether they are music or books—and therefore, maximal dissemination becomes possible. Digitization challenges the delicate balance of creators' and users' rights. The excludability level favoured by copyright may have become too severe for the digital world, hence the conflict we're facing today.

[*Translation*]

Economists have been studying this type of problem for many decades and analytical solutions do exist.

An optimal solution when allocating resources would be to have the price set at zero for this type of good or asset. That way, the goods could be distributed to the maximum extent possible. However, we then have a problem: how to compensate creators within such a system.

Economists have studied solutions such as limited distribution, whereby distribution would not be optimal and the price would be set higher than zero in order to ensure fair compensation for rights holders, while still trying to distribute the products as much as possible with some possible tinkering between the two solutions.

In order to put this or these types of solution into practice, we have to know the value of the product in question. What is the competitive market value of the works that are protected given that they are information goods or assets and that digital technologies have changed the commercial domain, making it nearly impossible to have a competitive market or to even sell those goods commercially?

How can we solve this problem that I have called, in one of my publications, the Gordian knot of today's corporate world?

[*English*]

We can arrive at a solution through four key changes.

First, move away from the current circular heuristics in favour of direct inferences of competitive market value from the behaviour and choices of users. This can be done. It is not done today. We say that we're going to set up the rates today at that level because two years ago or four years ago we did that. Therefore, we're constrained by those decisions.

Rights holders are significantly shortchanged by the current Copyright Act provisions, including exceptions of many kinds, and the way they are implemented. The undercompensation of creators, as compared to the competitive market benchmarks, is a significant impediment to a more efficient and vibrant economy. The under-compensation totals several hundred million dollars per year in Canada.

[*Translation*]

Secondly, we have to avoid stigmatizing creators, who are seen to be opposing the digital economy and maximum distribution of works through exceptions, including fair use.

Who, from apart the creators, should pay for these public policies?

Here's a first example.

In 2012, the government passed regulations to exclude microSD and similar cards from the definition of “audio recording medium”, thereby preventing the Copyright Board from setting a levy on such cards to compensate rights holders.

Here is the government's justification, and I've quoted a governmental publication:

> Such a levy would increase the costs to manufacturers and importers of these cards, resulting in these costs indirectly being passed on to retailers and consumers.
>
> ... thereby negatively impacting e-commerce businesses and Canada's participation in the digital economy.

You will see that I added [sic] at the end of the quote, by which I mean that such thinking could very well bring Canada back to the Stone Age.

Here is the third policy.

● (1610)

[*English*]

Bring to the table all major groups of beneficiaries and make them jointly and severally responsible or liable to ensure the proper, fair, equitable and competitive compensation of creators. It can be done. There's a long list of economic publications showing how this can be done, and why it should be done.

[*Translation*]

Fourthly, the current sequential determination of royalties makes it difficult to implement significant adjustment and reforms.

A little earlier, I stated that when we decide on an amount for royalties or set tariffs, we have to abide by what was decided last year or two years ago in a similar field. We should set up a system to allow all decisions to be taken jointly and concurrently so that we can better adapt to changing technologies.

Given that time is whizzing by, I won't be able to talk about the main difficulties in setting copyright tariffs, but I will just say the following:

[*English*]

the level playing field or technological neutrality principle, the competitive market value or balance principle, the socio-economic efficiency principle, and the separation principle. The last one says that it is neither necessary nor optimal that primary users' royalty payments be equal to the competitive market compensation of creators. Commercial radio doesn't mean that what they should be paying is what the authors and composers and performers should receive in terms of compensation.

[*Translation*]

The economics of cultural public policy are really the elephant in the room, alongside rights holders and users. In education, there is a difference between what consumers, i.e. parents and students, pay and what the providers of educational services and content, i. e. teachers, professionals and support personnel, receive.

In health care, there is a difference between what consumers or patients pay and what the providers of health care services such as doctors, nurses, and professional and support staff receive as compensation.

We can also make this type of distinction in the cultural sector.

I believe this is a fundamental aspect of the reform that we should aspire to.

Rather than talking to you about it, I will conclude by inviting you to read some publications in which I've set out ideas that could help you in your work on copyright reform.

Thank you.

The Chair: Thank you very much.

[*English*]

We're going to go to Mr. Hayes. You have up to seven minutes.

Mr. Mark Hayes (Partner, Hayes eLaw LLP, As an Individual): Thank you, Mr. Chairman.

I'm not a university professor, and I certainly don't have the long list that my friends have of publications. I've been out there actually doing this stuff for about 35 years, and that involves just about everything in copyright.

You'll see in my covering letter that I've made a list of some of the people I've acted for. I've spent a lot of time with the Copyright Board, including hearing Professor Boyer and his theories on quite a few of the cases.

Today, I want to talk about some practical issues. I've dealt with six of them in my written submissions. Because of time limitations, I'll just talk briefly about three today.

The first one is what I call the royalty penalty. There's been a provision in the Copyright Act for some time that provides an important tool for copyright collectives. In situations where a copyright user is subject to an approved tariff, but refuses or neglects to pay, the copyright collective is forced to take legal action and, on success of the action, can collect from three to 10 times the amount of the royalties.

The intent of this section is a really good one. Users shouldn't be allowed to refuse to pay and then, when discovered later, just pay what they should have paid in the first place. There has to be some kind of a penalty. However, in my experience, this provision of the act has been used far too often by collectives to threaten licensees who have legitimate disputes about how much they should pay in copyright royalties.

In my view, the use of this provision by collectives to try to coerce licensees to accede to demands by collectives, whether or not those demands are reasonable, appropriate or justified, is unfair and certainly not a balanced approach to copyright tariffs.

Let me give you a very simple example. Suppose that a theatre owner who puts on a musical presentation calculates that the royalty that's payable in respect of that is $1,000. They pay, or offer to pay, the $1,000, but SOCAN, the collective who would collect, comes in and says, “We think it's $1,500. If you don't pay $1,500, we're going to sue you and get three to 10 times the amount of what we should have gotten.”

What's the theatre owner going to do? He can stick by his guns and say, “Fine, sue me”, but the risk is that if his interpretation was wrong, which could be the case, he would have to pay between $4,500 and $15,000 in royalties, when the dispute was about $500. As a result, because of this risk, the theatre owner is essentially forced to accede and pay the amount demanded by collective, even if his interpretation of what was owed was correct.

In my view, this scenario is not a proper application of this section. I've actually been involved in cases where this threat was made and 100 times as much money was involved. You can imagine the amount of risk that is taken on at that time.

In my view, this section should make it clear that the punitive royalty provisions do not apply where a copyright user asserts a legitimate dispute concerning the applicability or calculation of royalties in an approved tariff. I suggested appropriate wording in my written brief.

The second issue I want to talk about is authorship of audiovisual works. Some organizations have appeared before you. Yesterday some organizations appeared before the Standing Committee on Canadian Heritage and suggested that the act should specify which of the creative contributors to audiovisual work should be deemed to be the author of those works. I'm in particular speaking about the Directors Guild and Writers Guild, who have suggested it should be hard-wired into the Copyright Act that the director and the screenwriter of an audiovisual work should be deemed to be the author.

Some copyright works, in particular audiovisual works such as motion pictures and television shows, involve a lot of creative contributions from a lot of individuals. As a result, it can be really unclear who is the author of the work.

This is what I call a long-term problem and not a short-term problem. In the short term, the producer of these audiovisual works, through contract, gets licenses or assignments of all of the short-term rights that are necessary in order to distribute the work.

However, portions of the rights around an audiovisual work depend on the authorship. For example, the length of the term is based on the life of the author. When the reversion right applies depends on the life of the author. At some point down the road—not in the short term, not when it's in the theatres—after some of the creative contributors start to die, who the author is all of a sudden becomes relevant.

Right now, that's not clear. I admit there is a point to be made as to putting some clarity into this. There is no doubt that the proposal by the Directors Guild and Writers Guild put some clarity into it, but is it the right answer?

● (1615)

In the United States, they have a fairly unique situation because they've created a thing called “work for hire”. A motion picture or television producer can get contracts from people and the producer is now deemed to be the author. However, in Canada and most OECD countries that's not the case. Authorship still remains unclear. In some European countries they have deemed some other creative contributors to be the author, including the director and the screenwriter and, in some cases, the cinematographer and the score writer, and there are various other people. This again can lead to some uncertainty.

Yes, while deeming certain people to be the author eliminates the uncertainty, it creates a number of problems, which I've explained in my written brief. I'm just going to point out two.

First, many audiovisual works don't have directors and screenwriters. The perfect example is computer games. Computer games are very important audiovisual works. It's actually a bigger industry in Canada than motion pictures and television. There are no directors. There are no screenwriters. How are they going to be authors?

The second thing is, if you're going to put in a rule like this that is contrary to the authorship rule in the United States, you really have a potential problem with the very important film and television production industry in Canada. You would want to be very, very careful about doing that and jeopardizing that industry.

Last, I want to make a brief mention about the machine learning exemption, which I'm sure you've heard about. You've had several people come before you. I think it is really important that we have some kind of exemption that deals with these incidental reproductions that are created by machine learning.

However, in my view if we've learned anything from the last 20 or 30 years of copyright reform, it's that having specific provisions about developing technology is not a good way to form legislation. The simple reason is that, by the time you actually study it and get the legislation in place, the technology is off somewhere else. You're always going to be chasing this rabbit that's always one step in front of you. In my view, what's important is to make sure we get at the root problem.

What is the root problem that's been talked about in machine learning? It's a thing called incidental reproductions. What happens is that, in technological processes like machine learning and so on, there's a bunch of these little reproductions that have absolutely zero economic impact. They're not being sold to anybody. They're not being leased to anybody. They allow the technology to happen.

The last time we had a very major copyright reform, we created a section called section 30.71 entitled “Temporary Reproductions for Technological Processes”. Everybody thought that this would work, that it would allow these reproductions to be done. Unfortunately, in 2016, the Copyright Board made a decision that very substantially limited the ambit of the section and in essence made it largely a dead letter.

In my submission, what should happen if we have concerns about machine learning—and we certainly should—is to make revisions to section 30.71 to bring back the robust exemption that we intended to have for these technological processes that have been largely eliminated by this interpretation. I've given some suggestions in my written material. I'd be happy to talk to you about it. I think a revised section 30.71 would better position Canada and its technological leaders for future technologies, which we don't yet know what they are. Frankly, I can't guess them and I'm pretty sure most of you can't either.

Thank you very much.

● (1620)

The Chair: Thank you very much.

Finally, we have Mr. Knopf, for seven minutes.

Mr. Howard Knopf (Counsel, Macera & Jarzyna, LLP, As an Individual): Thank you, Mr. Chairman.

Good afternoon, members. I'm also here for my third time this week. As a former prime minister said, I guess that gives me a three-peat.

I won't repeat what I said at the Senate banking committee and yesterday at the heritage committee, but I will repeat one thing I said yesterday, which was this.

There’s no “value gap” in the copyright system. However, there’s a serious what I call “values gap” in the fake news that is being disseminated these days about IP in general and Canadian copyright revision in particular.

Today I'll talk about a few other issues and flag some that I'll include in my written brief in more detail when I submit it on or before December 10 of this year.

For today, number one, we need to clarify that Copyright Board tariffs are not mandatory for users. The elephant in the room—the second elephant today—is the issue of whether the Copyright Board tariffs are mandatory. They are not. I successfully argued that case in the Supreme Court of Canada three years ago, but most of the copyright establishment in Canada today is in denial or actively resisting that ruling.

A tariff that sets the maximum for a train ticket from Ottawa to Toronto is just fine. We used to have such tariffs before deregulation, but travellers were always free to take the plane, the bus, their own car, a limousine, their bicycle or any other legal and likely unregulated means.

Choice and competition are essential not only for users but for creators. Access Copyright charges educators far too much for far too little, and it pays creators far too little. In fact, they only got an average of $190 for 2017 from Access itself and from their share of the publishers' portion.

There is intense litigation ongoing now between Access Copyright and York University, which is now in the appeal stage, and other litigation in the Federal Court involving school boards. Unfortunately, York failed in the trial court to address the issue of whether final approved tariffs are mandatory.

Hopefully, the Federal Court of Appeal and, if necessary, the Supreme Court will get this right in due course, but we can't be sure. The other side is lobbying you heavily on this issue, including with such devious and disingenuous suggestions as imposing a statutory minimum damages regime of three to 10 times the amount, on the totally inappropriate basis of symmetry with the SOCAN regime, which is the way it is for good reasons that go back for more than 80 years, but would be totally inappropriate for tariffs outside of the performing rights regime. In fact, Mr. Hayes has pointed out problems even with the SOCAN regime.

I urge you to codify and clarify for greater certainty—as lawyers and statutory draftspersons like to say—what the Supreme Court said in 2015, consistent in turn with previous Supreme Court and other jurisprudence going back decades, which is that Copyright Board tariffs are mandatory only for collectives but optional for users, who remain free to choose how they can best legally clear their copyright needs.

My second point today is that we need to keep current fair dealing purposes in section 29 and include the words “such as”. The Supreme Court of Canada already included the concept of education in fair dealing before the 2012 amendments kicked in. The U.S.A. allows for fair use “for purposes such as”—and I'm emphasizing those words—“criticism, comment, news reporting, teaching (including multiple copies for classroom use)”.

I ask you to ignore siren calls urging you to delete the word “education” from section 29 and urge you to add those two little words “such as”, as our friends and neighbours in the U.S.A. have had for 42 years.

My number three point today is that we need to ensure that fair dealing rights cannot be overridden by contract. In 1986 the Supreme Court of Canada, in an important but not well-known case, ruled that consumers cannot lose their statutory rights by contracting out or waiving their rights in the case of, for example, when it comes to everybody's right to pay off their mortgage every five years. We need to clarify and codify a similar principle that fair dealing rights and other important users' rights and exceptions cannot be lost by contracting out or by waivers.

Number four, we need to explicitly make technical protection measures—TPMs—provisions subject to fair dealing. We need to clarify that users' fair dealing rights apply to circumvention of technical protection measures, at least for fair dealing purposes in section 29, and for many if not all other exceptions provided in the legislation as appropriate.

● (1625)

Number five, we need mitigation for the nation. My friend Jeremy started using the word “mitigation” after the USMCA came in, and he made some good points. We need to mitigate the damage done by copyright term extension under both the Harper government, where it was buried deeply in an omnibus budget bill—heard of one of those recently?—and by this government in the USMCA. These concessions could cost Canada hundreds of millions of dollars a year, and even worse now, must be given to the EU and all our other WTO TRIPS treaty partners because of the most-favoured-nation and national treatment principles to which Canada is bound. One small mitigation measure might be the imposition of renewal requirements and fees for those extra years of protection that are not required by the Berne convention.

Number six, we need to look carefully at enforcement issues. I know that you're under immense pressure from some very well-funded, powerful and aggressive lobbyists and lawyers on site blocking. I'm not convinced that we need any new legislation on this issue, but I am looking into it carefully and may perhaps write more about it. In the meantime, you should be looking at the existing though not the proposed provisions in section 115A of the Australian Copyright Act, and U.K. case law.

We may also need to address the issue of mass litigation against thousands of ordinary Canadians who happen to be associated with an IP address that is the subject of a notice under paragraph 41.26(1)(a) and who are alleged to have infringed a movie that could be streamed or downloaded for a few dollars. This litigation is not akin to a parking ticket. There are systematic efforts to extract thousands of dollars by way of so-called settlements from terrified Internet account holders who may have never heard of BitTorrent until they get that dreaded registered letter in the mail. These efforts may succeed in many cases because access to justice is very difficult in these circumstances. If the government would only do its job on the notice and notice regulations, that might be a good start.

Number seven, we need to repeal the blank media levy scheme. We need to get rid of the zombie-like levy scheme in part VIII of the Copyright Act and stop listening to the big three multinational record companies who conjure new kinds of taxes on digital devices, ISPs, Internet users, the cloud and whatever else looks lucrative. Even the U.S.A. doesn't entertain such fantasies.

I'm getting to my last point now.

We need to stop this five-year ritual of review. I don't always agree with Jeremy on everything, certainly not on certain aspects of this study about the Copyright Board, but I do very much agree with him on this. We have had two major and two medium-scale revisions to copyright law in Canada in the last 100 years, two and two only in the last 100 years, and a few more focused ones in between.

There's no need for a periodic copyright policy review. It's lucrative for lobbyists and lawyers, but it's a waste of time, including Parliament's time, and that's important. Reacting reflexively and prematurely to new technology is usually very dangerous. If we had listened to the whining of the film industry in the early 1980s, the VCR, the video cassette recorder, would have become illegal, and Hollywood as we know it might have committed economic suicide. Who can forget, at least some of us of a certain age, the famous words of the late movie industry lobbyist, Jack Valenti, who said that the VCR was to the American entertainment industry as the Boston strangler was to the woman alone.

Particular issues can be addressed as needed, which is the way most other countries cope with copyright.

I thank you for your patience, and I look forward to your questions.

● (1630)

The Chair: Thank you very much.

We're going to jump right into questions with Mr. Longfield.

You have seven minutes.

Mr. Lloyd Longfield (Guelph, Lib.): I'll jump as much as I can, Mr. Chair.

Given the topic, it's a weighty topic. As you've all noted, it's a difficult one for us to be addressing on a frequent basis, frequent being five years.

Something that wasn't mentioned was article 13 in the European agreements. As we develop our trading agreements with Europe and with Asia-Pacific now, and with the new North American trade agreement, copyright competitiveness within our region is something that I'm concerned with and how the market works within Canada compared to other regions. Do we have some opinions on article 13 that you could put forward for our study?

This question is for anybody.

Mr. Howard Knopf: I'll start on that one. It's very controversial. It's very maximalist, as we say. There's no need for a snippet tax or a Google tax, or whatever you call it. There's no need to put filters on what can be uploaded. This could be, to use an overworked phrase, the end of the Internet. There's no good in it. The Europeans get very maximalist very quickly and sometimes not for anybody's good in the long run.

Let's not race to the bottom of maximalist copyright protection. We stood up to them in CETA. We resisted the 70-year term and some of the other excesses. We caved in to the Americans, and maybe, as Jeremy said, we had no choice with that fellow in the White House, but we don't have to keep making that same mistake.

Prof. Jeremy de Beer: I'd like to add to that if I may.

Mr. Lloyd Longfield: Please.

Prof. Jeremy de Beer: I think it's likely to backfire in the EU. It's a terrible idea. The ostensible purpose is to force Facebook and Google and the other big tech companies, which the Europeans are rightly concerned about, to pay for more content. The more regulations apply in this context, the more it's actually going to entrench the powerful positions of the companies that can afford to pay those royalties and comply with the regulatory requirements like upload filters. I read a great article that said that Google's first choice is no regulation, and their second choice is lots of regulation. This is a terrible idea.

Mr. Lloyd Longfield: We've seen that in some recent comments as well. Thank you, both, for that.

On a different topic, Mr. Boyer, I'm really interested in the slides you showed us. I was having trouble keeping up with some of the potential opportunities. We don't have time in the committee to really dive into the topics, but one of the ones that really was interesting was getting all the players around the table. Something we've had problems with since the beginning of this study is trying to find out what parts of the market are working and what parts aren't working. There's general consensus that creators aren't getting paid their fair share, but is that because of copyright or not?

How could we suggest in our report how to bring all the players—the SOCANs and the Access Copyrights and the creators and the publishers—to the table? Who would those people be? How would we bring them together?

● (1635)

Mr. Marcel Boyer: It's going to be difficult, because it needs changes in different laws, I guess, which is a field I don't really understand because I'm not a lawyer. It's clear that if you want to implement the competitive market value of music on commercial radio as estimated from the behaviour inferred from the behaviour of radio station operators, as I did in some of the publications I showed, this would represent, today, something like $450 million per year in royalties. This is the competitive market value of music as revealed by the choices and behaviours of radio station operators.

Today, commercial radio pays about $100 million a year in royalties for music. Of course, you're not going to ask the commercial radio operators to pay the $350 million that is missing there, because that would limit too much the distribution and dissemination of music. Therefore, you want to bring...but how are you going to do it? You have to bring the other beneficiaries—equipment producers, content, other types of...and governments as kinds of collectives, and consumers. They have to be sitting around the table and saying that we have to pay the commercial value, the competitive market value, of music. How can we do it? You have to share it among us.

Mr. Lloyd Longfield: Maybe in a general statement, is it about having transparency at all levels?

Mr. Marcel Boyer: Yes.

Mr. Lloyd Longfield: You might not bring them into the same room, but they could have a reporting structure of some sort in which we could understand where the value is being....

Mr. Marcel Boyer: Absolutely.

Mr. Mark Hayes: I think part of the problem is that there is no incentive to anyone on the user side or on the collective side or on the industry side to actually do anything but their talking points. There really is zero benefit to them, and this is one of the problems in the system. In the Copyright Board system, for example, there is zero incentive for anybody to compromise.

Mr. Lloyd Longfield: What would an incentive look like?

Mr. Mark Hayes: I think you have to look at other industries in which people have summits behind closed doors. In this kind of forum, nobody is going to be off their talking points. It's just not possible. If you had some kind of a summit behind closed doors with Chatham House rules so nobody's allowed to talk about it, etc., maybe you'd get some real answers, but in this kind of a setting, you are not going to get anybody telling you what's going on and you're not going to get the transparency you're asking for.

Mr. Howard Knopf: The commissioner of competition has for a very long time had the ability to weigh in on these issues at the Copyright Board. They've never even opened a file or lifted a finger to do that. They should be encouraged, if not told, by somebody to do that. They're independent, so it's not easy to tell them what to do. Another thing might be that the Copyright Board should, either of its own motion or, if necessary, through regulations that somebody should put in place, be forced to have more transparency. They should force, for example, disclosure—sunshine laws—about the salaries of senior people at collectives, about how much they spend on legal fees, and the average and median return to members of collectives on an annual basis.

The board doesn't want to get anywhere near that. I've urged them to. It seems to me that should be their first order of business, because collectives are there for the public interest.

The Chair: Thank you.

Mr. Lloyd Longfield: For your multiple witnessing at different committees, thank you for all your service to our government.

The Chair: Before we move onto Mr. Albas, Mr. de Beer, you had referenced a document. Could you send it to the clerk, please?

Prof. Jeremy de Beer: Yes.

The Chair: Thank you very much.

Mr. Albas, you have seven minutes.

● (1640)

Mr. Dan Albas (Central Okanagan—Similkameen—Nicola, CPC): Thank you, Mr. Chair.

Thank you to all our witnesses for your testimony here today and multiple testimonies at different committees.

I'll start with Mr. Hayes.

You gave in your opening comments the example of SOCAN, where someone is putting on a feature that they calculate to be $1,000 in royalties, SOCAN takes a different position and, therefore, it could be $4,500 if it's three times what it was.

First of all, if collectives are only able to seek actual damages, won't people just automatically refuse to pay tariff as the worst punishment they would face in the first place?

Mr. Mark Hayes: No. As I said, there is a value in the punitive aspect of it if there's no legitimate dispute. That's why the wording that I suggested in my written brief was that if there is a legitimate dispute, it wouldn't apply. That would be again for the courts to decide as to whether it was a legitimate dispute.

Very often the way this is used is when someone just does not pay, if you have a bar or a restaurant that just doesn't pay. They either don't know or they just refuse to do it and they're hoping they don't get caught. That's not the situation I've been involved in, where you have legitimate disputes as to applicability or calculation. You shouldn't have this punitive provision being used as a cudgel by one side to try to force the other side to settle.

Mr. Dan Albas: In those types of cases, then, would it not be smarter to make a secondary regime? For example, rather than count the whole $1,500 as being where you take that, times three or times 10, depending. You say it's the difference between the amount that the proprietor had suggested and the value that SOCAN in this case would have said is the right amount, that $500. To me, you would see probably focusing a little more on actual—

Mr. Mark Hayes: That's one alternative. The problem is that there is no other regime where you, on the one hand, take a position and the other side essentially is saying, “Okay, I have three to 10 times the amount of power than you have in this dispute”.

Mr. Dan Albas: There is a market power, or at least in this case, a monopoly power—

Mr. Mark Hayes: Another alternative would be that you wouldn't have to pay the punitive sum if you put up security for the amount that it is said to be. There are various ways to do it.

However, in terms of just having this penalty, remember, it's a minimum of three times. The judge can't go below three times. The minimum is three times, up to 10 times. Just to have that there is a cudgel for one side, and in my submission, is just unfair.

Mr. Dan Albas: Mr. de Beer, you've been to a number of different committees, as some of the other witnesses have as well. By the way, all of that now is Crown copyright, so I hope you're okay with that. We own your ideas as a parliament. I'm just advising you of this.

Prof. Jeremy de Beer: Yes.

Mr. Dan Albas: As a side note, though, can you describe how fair use as it exists in the United States is superior to the fair dealing provision exceptions we have in Canada? I found your argument saying, if you're going to take the worst of a regime, you'd also better complement with some of the release valves or at least some of the best.

Can you explain that in more detail?

Prof. Jeremy de Beer: The reason it's preferable is essentially for the reasons Mr. Hayes gave around the text and data mining exception, because you don't have to constantly update the list of things that need flexibility or that you need breathing room or safety valves for. Rather than saying “Fair dealing for the purposes of” one, two, three, four, five or six things, which if we look at the pattern of reform have become increasingly specific and technical, you say “Fair dealing for purposes such as” some of the things we have is not an infringement of copyright.

The thing about innovation is that it is by definition disruptive and unpredictable. We want innovation, but you don't know what is going to happen. That's the point of innovation. You can't create a list of specific exceptions to enable things that you haven't thought of yet. The U.S. approach solves that with one swipe.

The argument you hear against that position is that it's too unpredictable, that it's too disruptive to settle Canadian practice. I don't believe that at all. In fact, we can have the best of both worlds by simply doing what Mr. Knopf suggests, called the “such as” solution. Just put in those two words, “such as”. It would give us the breathing room that the Americans have to drive innovation and not stifle it.

Mr. Dan Albas: In the last meeting of this committee, I asked about an exemption for reaction videos, for example, that allows for people, as you said, to just put up something with their reaction to it. Do you think there needs to be some carve-out for that type of activity?

● (1645)

Prof. Jeremy de Beer: I don't think there needs to be any more specific carve-outs for particular activities. I think what we need is a much more flexible and technology-neutral approach, as fair use is. Look at the provisions. Every time we've tried to put in these technical little micro-exceptions, it backfires. I can give you 20 years of Supreme Court cases to prove it.

Mr. Dan Albas: You stated before the heritage committee that educational authors earned virtually nothing from their works and that publishers get all the rights and, obviously, profits when they sell the work to academic institutions.

How can the Copyright Act address this?

Prof. Jeremy de Beer: I think that it's not necessarily a copyright problem. It's a contracts problem. What I like to see are measures the government takes requiring open access to research, for example, by research funding agencies.

I think there are certain measures that you could take to reinforce the bargaining position of authors vis-à-vis publishers and other intermediaries, but it's not easily done. It's a complex issue. The core point is that it's not a copyright problem. That's the point I was trying to make.

Mr. Dan Albas: Mr. Hayes.

Mr. Mark Hayes: I've been on both sides of this. I've written, and I've negotiated these deals and so on. The fact is that in academic writing, the publishers have a huge advantage because the academics need to publish. You have a very willing seller and a not-very-willing buyer. They'll buy it or not buy it, and they're going to take most of the money for it.

It's a market issue, and if you get into it in the copyright reform, to try to fix the market, you go down that rabbit hole very fast and get into a lot of trouble.

Mr. Dan Albas: It's about competitiveness, as Mr. Boyer said.

Mr. Mark Hayes: Yes, exactly.

Mr. Howard Knopf: There are potential big antitrust issues with some of the gigantic, multinational, billion-dollar publishers that impose these conditions, but I suggested a solution yesterday that got some good feedback on the Internet, for what that's worth.

The solution came not from me but from Roy MacSkimming, who's a long-time expert who did this work for the Public Lending Right Commission in Canada. He suggested what he called an educational lending right, which would require government funding but would compensate scholarly authors, like Professor de Beer and Professor Boyer, for the use of their work in educational institutions, much like we already have for public libraries where popular authors like Margaret Atwood get up to $3,000 per year for their books being lent. That amount has gone down. It should go up. It needs new funding.

Something like that for the educational realm would provide additional income and incentive for professors, and I also pointed out that professors are rewarded in other ways. If they write papers and books, they get promoted and they get tenure. Finally they're getting decent salaries now—six-figure salaries in Canadian universities—so it's not as if they're not being paid. It's just that they're not being paid as efficiently and elegantly as perhaps they should be.

The Chair: Thank you.

We're over time a bit, but we still have time for more questions.

[*Translation*]

Ms. Quach, you have seven minutes.

Ms. Anne Minh-Thu Quach (Salaberry—Suroît, NDP): Thank you, Mr. Chair.

Thank you all for being here.

Some of you have mentioned the economic repercussions of extending copyright from 50 to 70 years after the death of a creator.

Do you think that Bill C-86 will make a change in terms of access to fair use?

If so, what will change? Will these changes improve fair use?

Mr. Marcel Boyer: I believe that fair use should be defined legally and thoroughly to avoid useless legal battles. The economic problem, fundamentally, is that fair use is a type of expropriation of the creators' intellectual property.

We have to find a way to compensate fair use. Some might think that the user is not the one who should be paying royalties for the work used, or that someone else should pay.

When we have or add exceptions, even when we add “such as”, as someone else has suggested, or we tack on other exceptions to copyright, we expropriate creators' intellectual property without giving them any compensation.

In economic terms, the problem is that we have to decide who else should pay the authors, the composers and the artists, the rights holders and the creators for fair use.

The principle of fair use is not problematic in economic terms. It becomes a question of compensation. Someone has to pay, but who?

● (1650)

Ms. Anne Minh-Thu Quach: Have other countries dealt with this problem?

Mr. Marcel Boyer: Absolutely, and they've worked on fair use in terms of reproduction for private use.

I can make a copy for my private use for research purposes and someone will pay for that, such as equipment suppliers. The equipment supplier who helps me to make copies for research purposes will pay royalties to compensate authors, composers and artists.

In France, for example, reproduction for private use generates $300 million CAD per year in compensation for authors, composers and artists, whereas here in Canada, it is $3 million.

In my slides, which I did not have time to show you, I explain that federal regulations passed in 2012 state that microSD cards are not “audio recording mediums”, which is costing authors, composers and artists $40 million per year. No one is paying for that.

Ms. Anne Minh-Thu Quach: Thank you, Mr. Boyer.

I will let the other panellists respond as well.

Prof. Jeremy de Beer: Thank you very much, Ms. Quach.

[*English*]

I understand Professor Boyer's position but I take a different view. I don't think that exceptions and limitations like fair use are expropriations of proprietary rights. The default situation is not that a copyright owner has the right to control every use of its work and every time you limit that it's an expropriation. The default is the opposite.

The default position is freedom of expression and the liberty to do whatever you want. We provide copyright protection as an incentive to encourage investments in creativity. To quote a phrase that the Supreme Court of Canada has used from my former graduate supervisor, Professor David Vaver, “user rights are not just loopholes”. I think that's important. It's a different view of the issue.

Mr. Mark Hayes: I use this often for students. When you think about copyright it's an island and the island has a bunch of little bays, little cut-outs and little eddies and things in it but the island is still the nature of the rights. The island isn't a bigger island that you're cutting parts out of.

The copyright is the entirety of what is granted, including the things that have been carved out of it, these little bays and eddies. It's not an expropriation to look at an exemption. It is a part of the grand bargain between society and creators and users.

Mr. Howard Knopf: Yes, I enthusiastically disagree with Professor Boyer here. Fair dealing is user rights. The Supreme Court of Canada said that very eloquently and very famously in the 2004 CCH case. They are users rights as much as the right to be paid is a creator right. They are equal and they balance each other.

Professor Boyer is wrong about the $40-million cost of the SD card exception. I was very much, maybe mainly, responsible for the regulation that made that happen. Give me one good reason, Professor Boyer, why the SD card in my phone so I can take pictures of my cat or my grandson should have a tax on it? Why does that need to go to Access Copyright or some other collective? It doesn't make any sense.

Also you mentioned an issue in term extension. I'll give you a very good example right now of why it's important to make the public domain as big as possible. We have a president in the United States who has everybody worried about a lot of things right now—I don't even like to say his name. All of a sudden a certain book by George Orwell, *1984*, has become very popular again for obvious reasons. That book has long since been in the public domain in Canada but Americans have to pay $30 or whatever for it and fewer of them will get access to it.

It's very important to get access to the public domain as soon as possible. Even if it's not a popular book like *1984*, to have it overprotected by copyright means it's going to be harder for university students, teachers and researchers to get hold of it. There is going to be more uncertainty. There will be a cloud over it. It's going to enter the dreaded category of what we call “orphan works” where somebody owns a copyright but nobody knows who or where to find them. We need to get into the public domain as soon as possible. That's why I'm suggesting the imposition of formalities for that final term of 20 years.

● (1655)

The Chair: Thank you very much.

We'll move to Mr. Graham for seven minutes.

Mr. David de Burgh Graham (Laurentides—Labelle, Lib.): Thank you.

A comment we've heard a bit is that the five-year revision is too often. I'd like to point out that it has the advantage of giving every MP who ever comes to the House the opportunity to talk about it.

Voices: Oh, oh!

Mr. David de Burgh Graham: I also want to follow up on a point that Mr. Albas raised. He commented that the testimony here is under Crown copyright. I think that's not actually the case. We're not subject to the Crown. We're subject to the Speaker.

I'll put that thought into the analyst's head. Perhaps we could revise what copyright we release our report under.

Mr. Dan Albas: Just read up on it.

Mr. David de Burgh Graham: Just for fun.... At the start of the report it always states that the Speaker grants permission under his copyright.

Mr. Matt Jeneroux (Edmonton Riverbend, CPC): Through the chair....

Mr. David de Burgh Graham: Through the chair, yes.

Mr. de Beer, you mentioned that 150 years is an awfully long period of copyright. I tend to agree with that assessment, although it does assume that people are producing stuff from birth to get to 150 years, so maybe it's only 135.

Prof. Jeremy de Beer: That's a good point.

Mr. David de Burgh Graham: What is a reasonable period for copyright? What value does society get out of copyright surviving life in the first place?

Prof. Jeremy de Beer: That's a great theoretical question, but as I mentioned in my remarks, I'm a pragmatist. There's an international agreement called the Berne convention, which sets the minimum term that any member of Berne, which includes Canada, can have. That is the life of the author plus 50 years. That's the international standard. That's what Canada should stick to, in my view.

Mr. Knopf's idea is a great one. If we're going to extend that, there's no reason why we can't make the extension of copyright term subject to formalities. We can't do that for the first life plus 50 under the Berne convention, but it's a brilliant idea to make that happen for the second. It would create all kinds of positive ripple effects—namely, moving towards a registry of copyright as exists for every other kind of property right in the world. We can deal with the problem of unlocatable owners or orphan works and begin to treat copyright like a commodity, like the property right that it is. We can only do that if it's registered. Putting that in as a condition of the extra 20 years of protection is a brilliant idea.

I don't think this committee needs to do that, incidentally, or recommend that. That's part of the NAFTA or the USMCA implementation, but you can certainly consider it.

Mr. David de Burgh Graham: That's fair. You're suggesting that copyright should be a proactive rather than a reactive thing—not an automatic thing.

We had one person here some weeks ago talking about the fact that there are labels under ACANs with copyright for life plus 70 years. Should copyright require registration to even apply in the first place, or can we do that?

Prof. Jeremy de Beer: We are not allowed to do that under the Berne convention. We can't impose formalities for the life of the author and the first 50 years, but if we're going to extend to life plus 70, we certainly can and we certainly should.

Mr. David de Burgh Graham: Thank you.

[*Translation*]

Mr. Boyer, I have a question.

If I understood correctly, you basically believe, for example, that all products under copyright are not equal and that the length of copyright should not be the same. Did I understand correctly? Each product is different.

Mr. Marcel Boyer: Of course, every product is different, but the underlying principles used to calculate royalties should be the same.

All products are different in economic terms, including the various forms of artistic expression which comprise the goods or assets under copyright. That said, the underlying principles of competitive value and fair remuneration which, for an economist, mean competitive remuneration in competitive markets for the asset or product sold, should also apply to goods and services under copyright protection.

The practical application will vary, whether it is a composer, an artist, a producer, an author of printed textbooks or of a novel, and so on, but the underlying principles are the same.

I don't know if that answers your question.

● (1700)

Mr. David de Burgh Graham: Yes, more or less. Thank you, Mr. Boyer.

I have questions for everyone and I don't have enough time to ask them all. I will just carry on.

[*English*]

Mr. Knopf, you mentioned in your comments something about looking at the Copyright Act in Australia as it exists, not at the proposal. What is it in the Australian proposal that you don't want us to see?

Mr. Howard Knopf: Well, you're free to look.

Voices: Oh, oh!

Mr. Howard Knopf: In fact, I'll send you material through the clerk.

They have a provision there, section 115A, that deals with site blocking and it's fairly well balanced. I looked at it in detail and there is some recent case law on it. I'm trying to remember the name of the case. Again, I'll send you the information.

It requires rigorous judicial process, rule of law and fairness to the other side. The injunction can't be any longer or broader than absolutely necessary. It's a balanced proposal. The new proposal would get rid of some of the rule of law and protective aspects of it and allow the injunction to be a lot broader and a lot longer and a lot wider than necessary. It might interfere with freedom of expression and a whole bunch of stuff.

I'm not trying to keep a secret from you. I'm just saying that the current version seems to be working really well, but that's not good enough for the big record and movie companies who always want more.

Mr. David de Burgh Graham: Thank you.

Mr. Howard Knopf: And the U.K. doesn't have a specific provision, but they have some—I looked at it quickly—reasonably sensible jurisprudence.

Mr. David de Burgh Graham: Mr. Hayes.

Mr. Mark Hayes: Yes, as I think I tweeted this morning, the Australians have gone all in on site blocking, and they're the first country really to do it. It's a very interesting experiment.

Mr. David de Burgh Graham: The first democracy to do it.

Mr. Mark Hayes: Yes, the Chinese didn't even have laws to do it.

They've really gone all in and it's going to be very interesting to see how it turns out. If anything, I would have thought most other countries would want to sit back for the next three, four, five years and see how good or how bad it turns out, as opposed to necessarily following what they did.

Mr. David de Burgh Graham: Mr. Hayes, you offered to talk more about section 30.71 in your opening remarks. You have 30 seconds to do so.

Mr. Mark Hayes: I had proposed five things in my written provisions that should be in 30.71: it can involve human intervention; it's not limited to automatic processes; it's not limited to instantaneous processes; obviously machine learning is a technological process. These are the things that I think would necessarily be done, but frankly, the kind of proposal that Mr. de Beer is making, where you have a non-exhaustive list of fair use that mentions machine learning, mentions incidental reproduction, I would have thought that would be a solution to so many of these things and would not require a specific list of things that we have to try to deal with on a going-forward basis.

Mr. David de Burgh Graham: Thank you.

The Chair: Thank you very much.

Now we move to Matt own-the-podium Jeneroux.

That's what it says there.

Mr. Matt Jeneroux: Nice. All right,

It's good to be back, Mr. Chair.

The Chair: It's good to have you back.

Mr. Matt Jeneroux: Thank you, witnesses. It's good to see a thorough study of copyright continues, as back in my previous time here.

Mr. Chair, do I have five minutes?

The Chair: You have, actually, four and a half now.

Mr. Matt Jeneroux: Thank you.

I do want to come back to your comments, Mr. de Beer. I'm still struggling to understand why, regardless of whether it's five years or it's 10 years in terms of the mandatory review.... I believe that what we're trying to accomplish as a committee is to look at the long view. We're trying to project what we don't know is essentially determined in copyright. There's so much in terms of technology in the last five years. Things like Twitter and social media weren't to the extent they are today.

I've always supported the five-year review, but your raising it has me a little confused and questioning it somewhat. To reconcile the new technology piece with not doing a review at all, help me out a little.

Mr. Knopf, maybe since you hold the same position, you could also comment on this.

Prof. Jeremy de Beer: One of the problems is that it takes away some of the responsibility to create a technologically neutral act in the first place, because people think they can just fix it again when they reopen it five years later. That's one problem.

Another problem is that it's very politically expedient. I get that. Everybody's coming here. There are 182 witnesses. They all want something, and you can't give everybody everything they want, so it's very nice to say, come back in five years and we'll talk again. It's very politically expedient, but it just means everybody lines up every five years and asks for the same thing. I've been around this for only 15 years, not as long as some of my colleagues here, and really, it's tiring. It's just the same debate over and over again. It's not very helpful.

I think those are really the main two problems. It's a disincentive to draft technologically neutral principles in the first place, and it just gets us on this constant hamster wheel of lobbying.

I'm not saying the act doesn't need to be reopened, but every five years.... The other part about this is that we don't even know. The implementation of the last reforms is just working its way through the court. All of the regulations to tie up the loose ends from the last batch of reforms aren't even in place yet. There was a Supreme Court decision in the last couple of months dealing with the notice and notice provisions.

It's just too soon. We don't know if things are working or not working yet.

● (1705)

Mr. Matt Jeneroux: Sorry, Mr. Knopf, just before I go to you, I want to follow up on some of that, quickly.

The YouTube exception, for example, it came out of the last review because YouTube was a new thing, if you will. Who knows what five years from now will bring, so in terms of not reviewing it, how do we react to that? Are you saying we put in draft legislation when those exceptions come up? Because then I worry that there are other impacts on certain things, and we may or may not know what those things are.

Prof. Jeremy de Beer: The YouTube exception, the user-generated content exception, the text and data mining exception, and all of these micro-exceptions for libraries and archives and museums would all be unnecessary if we just put two words in the act: “such as”. It's a much simpler solution that will stand the test of time.

Mr. Matt Jeneroux: Sorry, Mr. Knopf, go ahead.

Mr. Howard Knopf: There's an old song. I won't try to sing it. The fundamental things apply as time goes by. It's in *Casablanca*. Some things just don't change, even since the first copyright act in 1709. Certain principles don't change very much, and they certainly don't change very quickly.

As I said, it's a really bad idea to try to get ahead of things in the interests of being smart and tech-savvy. If anyone had listened to Jack Valenti, Hollywood as we know it might be dead, if his own industry had listened to him.

It's a big mistake to try to react quickly to technology, because these things don't really change. The details do and the market sorts it out. The best copyright act the world has ever seen was the 1911 U.K. act, which was really short and very general and really simple. Thank God, Canada still has the skeleton of that. The U.K. has gone off the deep end with details, and the U.K. judges hate it. Everybody hates it because they move too quickly, too often.

Working on this VCR case was the first thing I did when I joined the government as an analyst back in 1983. I wrote a paper as to why we don't need legislation.

I'll leave you with one other example. In 1997, I believe—or maybe it was 1988; no, I think it was probably 1997—some wise bureaucrat over at heritage inserted an exception in the Copyright Act called the dry-erase board exception. It said it was okay for a teacher to take chalk or a marker and write on a dry-erase board by hand as long as it was then erased with a dry instrument. I did a sarcastic piece in the newspaper, and the cartoonist showed a janitor using a wet brush. It was a question of whether that was infringing. Mercifully, that frankly stupid exception has been gotten rid of, but this shows the level of detail that people can get involved, with all the best intentions, that are completely counterproductive.

Again, I'm happy to agree with Jeremy on this. I was trying to find the quote—Winston Churchill or somebody. An official came to him and said there was a terrible crisis and he must speak to him immediately. Churchill said, if was still a crisis the next day, he should come back and they would talk about it.

The Chair: Thank you.

We're going to move to Mr. Jowhari.

You have five minutes.

● (1710)

Mr. Majid Jowhari (Richmond Hill, Lib.): Thank you, Mr. Chair. I'll be sharing my time with Mr. Lametti.

In the two and a half minutes that I have, I'd really like to go back to Mr. Hayes.

Mr. Hayes, in your testimony you indicated that there were six issues that you wanted to talk to us about. You highlighted three of those, and then you ran out of time. With all my other questions being answered, I would really like to give you two and a half minutes or two minutes to be able to highlight those three. I know they are part of the submission, but it would be good if everyone could benefit from it in a quick two minutes. Thank you.

Mr. Mark Hayes: The first one is the charitable exemption. You had some submissions by, I believe, SOCAN and perhaps some others regarding limitations to be put onto the charitable exemption. The charitable exemption has been in our act for almost a hundred years. The only major litigation about it was in the 1940s involving Casa Loma and concerts they put on and this kind of thing.

I represent a number of charities that operate under the charitable exemption. The reason they do is not because their charity is registered under the Income Tax Act, but because their charitable charter specifically says they put on musical presentations. That's what they do. The charitable exemption is specifically intended to deal with their activities, yet SOCAN has continued to argue that, no, it doesn't, because of these restrictions, which now they claim are implied and they're asking you to put in.

In my submission, there are all sorts of things: musical programs, symphonies, church and school groups. They're all going to be very seriously hindered if that change is made.

My friend, Bob Tarantino, came before you and talked about reversion of copyright and suggested taking out the reversion provision. I know Bob well—

Mr. Majid Jowhari: Quickly go through the other two, because you've only got about—

Mr. Mark Hayes: He just says you should take reversion of copyright out. I don't see any reason. The only reason he really gives is the uncertainty. The uncertainty comes about because of the life of the author. The life of the author is uncertainty about term. It also makes the uncertainty about reversion rights. You're not going to get away from that.

I think it's a widows and orphans provision. It's for those authors and artists who didn't get the money they deserved, mainly because of bad contracts, or they weren't recognized in time. After they die there's a chance for their widows and children to be able to take the copyright back after a period of time. If there's still value, they can earn it. I don't think anybody has pointed out any real reason why that shouldn't happen.

By the way, there is a tiny proportion of copyright works that actually have any value by the time the reversion right comes up. It's actually done in a tiny number of situations.

The last one is about the definition of sound recording. I'm not really going to get into it. I went to the Supreme Court on it. We won at every single level. It's clear what the statute was intended to do. There's a business reason for it. I invite you to go back and look what the Supreme Court of Canada and everybody else said about it. There's absolutely no reason to change the provision except for the fact that the sound recording owners—in other words, the record companies—would like to get some more money.

Mr. Majid Jowhari: I'll turn it over to Mr. Lametti.

Mr. David Lametti (LaSalle—Émard—Verdun, Lib.): Thank you.

Mr. Hayes, we've heard a number of different ideas on machine learning or data mining exception, ranging from...to your point on incidental reproductions.

Do you think that your idea catches the use of a particular pool of data in order to draw out the numbers and do some sort of analysis?

Mr. Mark Hayes: Yes, I think it does. You have to remember that what is being asked for is not the right to be able to use every piece of copyright information or data or whatever. I think all of the submissions have made it clear. They're only talking about legally acquired copyright material. They've gone and bought or licensed a copy of the books, the magazines, the movies or whatever.

You're trying to get away from the copyright owner saying that the machine reading the book, listening to the movie, watching the television show, looking at the photographs—which they have to do by making an incidental reproduction because there's no other way for a machine to learn those things—is a copyright event, and that they should be paid more, in addition to the original purchase price or license price for the copyright work.

Mr. David Lametti: My concern is in the use and the transformation in running the data through. That there might be a claim that the use of it, not necessarily the copy of it, would fall under the ambit of the rights holder.

Mr. Mark Hayes: It doesn't seem to. Remember that copyright is a bundle of rights. In order for there to be a copyright event, you have to have done one of the rights. My reading a book is not a copyright event. Absent the reproduction part, there should be no reason why a machine reading a book is a copyright event as well.

● (1715)

The Chair: The time is up.

Mr. Albas, you have five minutes.

Mr. Dan Albas: Mr. Hayes, I'm going back to the charitable exemption.

Say you have a major festival that's charging big dollars for people to come in to hear a musician who may be using someone else's work. That's then surrounded with an exemption that it's for charitable purposes. I don't know about you, but at least where I come from, charitable purposes are about feeding people—either their minds or their stomachs. When people are utilizing large amounts of money, in some cases.... Some of these festivals might be paying someone $100,000 to come in and put on these productions.

Mr. Mark Hayes: That can happen, but it's relatively rare. In most cases, for these kinds of charitable things, a lot of the performers are contributing their services as well. Yes, it's true that there are costs.

Mr. Dan Albas: What's the proportionality, though, where there should be some sort of formal test? Someone just can't say they're doing this for charitable purposes.

Mr. Mark Hayes: There is a formal test.

Mr. Dan Albas: When there's no one other than the people who are attending that pay for the tickets...?

Mr. Mark Hayes: That's what I'm saying. There is a formal test. The test came out of the Supreme Court of Canada case dealing the Kiwanis Club and the Casa Loma. The Kiwanis Club lost and had to pay royalties because their charitable charter said nothing about putting on concerts.

Mr. Dan Albas: Yes.

Mr. Mark Hayes: That wasn't what they were talking about.

Mr. Dan Albas: Isn't it our job, though, to look and see what kinds of behaviours are appropriate and what are not and then to set the law? The court may have at least captured it within the context of that particular case, but I do just want to push back and say that not all charitable purposes are equal. Not all festivals are equal. There's a large difference.

I would hope you would agree with that.

Mr. Mark Hayes: I think this is a hard thing to capture. Look at some of the charitable organizations like the Royal Conservatory of Music. If you look at what they do, between the educational aspect and the presentation aspects and so on, it is absolutely impossible that they aren't serving, not only a charitable purpose but an important purpose in society and in the community.

That should be supported. I can tell you that if they were paying the same amounts as commercial producers, they would not be able to provide all that they do.

Mr. Dan Albas: If someone is running something similar to a commercial enterprise, there should be some questioning of whether or not it has a charitable purpose.

I thank you for your comments on it.

Professor de Beer, going back to a problem with contracts versus a problem with copyright, you've clearly said that a lot of this is on the contracts. As you said, every time there's this five-year review, everyone says we have a problem here because we don't like the common denominator or the contracts we've signed. What can we do to address this problem, or do we simply say if people make a bad contract, they have to live within those contracts?

Prof. Jeremy de Beer: The law of contracts provides one outlet if contracts are unconscionable. We can do more on a policy level to support artists and authors in their negotiations with record labels and publishers, but that's not through copyright. That's activities the Department of Canadian Heritage can do outside the copyright regime. We don't need legislative reform to do that. One of the best things we can do—and I've written about this—is to create a certification scheme. Someone's picked up on this idea and created fair trade music so consumers can make informed decisions. Where artists are fairly compensated, consumers can patronize those businesses that are certified to be compensating authors and creators fairly.

There are lots of examples of what we can do, but it's not a copyright problem.

Mr. Dan Albas: That's fair enough.

Again, we're discussing Crown copyright. I don't see this as being as big an issue, whether it be the Parliament of Canada or the Government of Canada. From what I've seen from some of the briefs we've had is that it seems to be certain courts—not all are the same—and their reporting functions, and some provinces. For example, if a company is trying to set up chatbots, whether federal or provincial, to talk about what labour law obligations someone might have, where you might talk to an AI, you insert the problem and receive an answer.... There are so many regulations now. If someone tries to draw in provincial law or provincial court cases and either can't obtain that information or is sued by the Crown, and it's a reserve power of the Crown, that would be an issue.

How do we get past this? Many different entities may take a different approach.

● (1720)

Prof. Jeremy de Beer: I would like to see us abolish Crown copyright. In light of what I said earlier about not giving everybody their ask and giving everybody what they want, I'm not asking you to do that.

I would note that a Supreme Court of Canada case is coming up. I got news the hearing has just been moved to February; it was supposed to be in January. I'm acting for the University of Ottawa Canadian Internet Policy and Public Interest Clinic, CIPPIC. We're filing our written submissions in that case next month. Some time in the next three to nine months the Supreme Court of Canada will issue a ruling on the interpretation of Crown copyright, and depending on what they say, it could either solve the problem or exacerbate it. I have to reserve judgment on the Crown copyright issue until we see what the Supreme Court says.

Mr. Dan Albas: In your opinion, should we continue to consider this, or should we wait for the court case?

Prof. Jeremy de Beer: You could abolish it or wait.

Mr. Dan Albas: Thank you.

The Chair: I hate to be a grinch, but we do have to be out of here by 5:30.

Mr. Sheehan, you have five minutes.

[*Translation*]

Ms. Quach, you have two minutes.

[*English*]

Then we have to go.

Mr. Terry Sheehan (Sault Ste. Marie, Lib.): Thank you, Mr. Chair.

Thanks to our presenters.

Since the beginning of this study a while ago, there have been a number of proposals from Canadian creators, amendments if you will, that would directly benefit them. I wanted to get your comments on some of them that have been proposed to us. I'll start with the first one, the resale right on visual works of art that allows the creator to receive a percentage of every subsequent sale, so the painter if you will, and then it's sold and sold. Second is granting first ownership of cinematography works to directors and screenwriters as opposed to producers—I think someone touched on it briefly. Then there's a reversionary right that would bring the copyright of a work back to an artist after a set amount of time, regardless of any contracts to the contrary, and finally, granting journalists a remuneration right for the use of their works on digital platforms such as news aggregators. We heard from Facebook at our last session and they had some comments about it.

Would you endorse these kinds of ideas? Do you think they would benefit creators, as opposed to rights holders more generally? What could be any unintended consequences of these proposals?

There are four of them, and I only have five minutes, so maybe Jeremy, Mark and Howard, you each could take a shot at one of them.

Mr. Mark Hayes: I talked about two of them in my presentation already: the reversion rights and the second one, the cinematographic works.

I don't really have much more to say on those unless you have specific questions. I think both those proposals don't make any sense.

Mr. Howard Knopf: Bryan Adams, I believe, actually suggested moving the reversionary right back to 25 years after the contract was signed. He had Professor Daniel Gervais, formerly of the University of Ottawa—quite a brilliant guy, who is now at Vanderbilt—say that should be given serious consideration. As for the resale right, it's a rabbit hole that I don't think Canada should go down. It's great for the auction houses. Maybe in some ways it will complicate the art market a whole lot. The art market has flourished very well for thousands of years without it. I don't know why we need it now. Some countries have it and arguably it's ruining the art market in those jurisdictions.

The other things that you mentioned—I don't remember them all, but many of them are just opportunistic. More rights are not necessarily better. Chocolate is good for you. Wine is good for you. Maybe even vodka is good for you, but all of those things in excess can be very bad for you, and maybe even fatal.

Mr. Terry Sheehan: One of them was granting the journalists remuneration rights. It's come up a few times in different testimonies.

Mr. Howard Knopf: Journalists should be well paid. They do very important work.

If somebody writes for the Toronto Star, they're getting paid a salary. Just because it shows up on the Internet doesn't mean they should get paid again.

Prof. Jeremy de Beer: That's the article 13 issue, and the link tax and the upload filters. It's going to backfire if we do it. We should absolutely not do it. The other things are a tempest in a teapot. Do whatever you want. It doesn't really matter in the grand scheme of things.

The problem is a different order of magnitude than is the link tax issue. It's the same thing with site blocking. You've heard a lot about site blocking. I think it's a terrible idea to do it in the Copyright Act. The provisions already exist in the rules of civil procedure and they've been well used. People say it's hard to get a site-blocking injunction. It should be hard to get a site-blocking injunction. It's an impediment of free expression and commerce. Most importantly, if, say, you're a victim of revenge porn, you have to go through the usual processes so why should copyright owners be treated any better or differently? It already exists outside of it. Those are the two big ones that I think you have to really worry about.

● (1725)

Mr. Terry Sheehan: Talking about some of the newer technologies that have popped up in the last five years, there's been a lot of testimony about Spotify and how Spotify functions. A lot of the artists are pointing out that revenue in the music industry as a whole has exploded. All the data will show that because of things like Spotify that replace your BearShares and all those other illegal activities...but in the opinion of Canadian creators—and they have data to suggest this—it's not keeping up at the same rate.

Do you have any suggestions, through either copyright or other means or mechanisms, on how that might be resolved?

Mr. Howard Knopf: The Copyright Board, as I said, should be more intrusive. They should force these collectives and parties to be more transparent about their internal operations and about how much money is actually getting through to the creators. They should not allow a collective or a corporation to operate with a Copyright Board monopoly if that outfit is not behaving fairly. The competition commissioner should get involved, which they've never done but they have the power to do. There are some giant, huge companies out there that are now, in hindsight, making Microsoft look like an angel, and that require anti-trust scrutiny.

The Chair: Thank you.

Sorry. We are down to the wire. If you'd like to answer that question in writing, please send the answer to the clerk.

We have two minutes left.

Madam Quach, it's all yours.

[*Translation*]

Ms. Anne Minh-Thu Quach: Thank you, Mr. Chair.

My question is twofold. I would like to ask Mr. Boyer what he thinks about defending artists' rights, especially when it comes to copyright protection on the Internet.

It is difficult. There is a lot of uncertainty and costs if one wishes to have one's rights upheld as a copyright holder for the use of works on the Internet, and there are two reasons for this. The first, is that it is tricky for an artist to get paid. Two months ago, the Standing Committee on Canadian Heritage heard David Bussières, who composes, writes lyrics and sings for the group called Alfa Rococo. He explained that if a song is played 6,000 times on the radio, he will receive over $17,000 in royalties but if the same song is played 30,000 times on Spotify, he is paid a paltry $10 or so. What can we do to solve this problem?

Sometimes, artists' works find a way onto various platforms or are used elsewhere. How can we help our artists?

Mr. Marcel Boyer: I don't know how much time is left, but I will try to answer in 30 seconds.

Spotify and commercial radio are two completely different technologies, and the way they calculate royalties owed on music is very different.

One of the reasons why Canadian artists are so badly compensated for streaming is that the Copyright Board of Canada uses commercial radio and equivalent playing time to estimate listener numbers, and so on. As the method used for calculating royalties for commercial radio is not competitive, it doesn't meet the criteria for remuneration in a competitive market.

Obviously, all this has been transferred to streaming and has also hurt our lyricists, our composers and our artists.

I said that we should avoid the sequential calculation of royalties, whereby previous decisions inform current decisions. In the case of streaming, the Copyright Board of Canada did precisely what it shouldn't have, and lyricists, composers and artists are paying the price.

I won't say anymore because the chair is telling me to stop.

The Chair: I have to do so because another committee will start up very soon.

● (1730)

[*English*]

The meeting is adjourned.

If you have answers to questions that we didn't get through, please send them in to the clerk.

I want to thank you all for being here today. It was another great session.