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Chair

Mr. Dan Ruimy

Standing Committee on Industry, Science and Technology

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● (1535)

[*English*]

The Chair (Mr. Dan Ruimy (Pitt Meadows—Maple Ridge, Lib.)): Welcome, everybody, to meeting number 141 as we continue our legislative review of copyright.

With us today we have, as individuals, Georges Azzaria, director of the art school at Université Laval; Ariel Katz, associate professor and innovation chair in electronic commerce at the University of Toronto; and Barry Sookman, partner with McCarthy Tétrault and adjunct professor in intellectual property law at Osgoode Hall Law School.

From the Canadian Bar Association, we have Steve Seiferling, executive officer, intellectual property law section; and Sarah MacKenzie, lawyer, law reform.

You will each have up to seven minutes. Then we will go into our questions. Hopefully, we will have time to get it all down.

We'll start with Mr. Azzaria. You have seven minutes, please.

Mr. Georges Azzaria (Director, Art School, Université Laval, As an Individual): Thank you.

Good afternoon, and thank you for the opportunity to speak to you today about copyright. With 186 witnesses having appeared before this committee, I hope everything has not been said.

I am the director of the art school of Laval University in Quebec City, and was previously a professor in the law faculty at Laval University for 15 years.

I will start with some general comments.

Making law is about ideas, priorities and objectives. A neutral standpoint does not exist, and a proper balance does not exist. Dozens of testimonies gave you dozens of points of view that were called balanced; none were neutral. The legislator is always making choices. That's nothing new. You all know that, of course.

Copyright law takes into account authors' rights, art practices, the concept of property, the concept of work, the concept of labour, the concept of public, and technologies. Copyright law is a cultural policy, and there are many ways to build a copyright law with these concepts.

Copyright was, historically, a way of providing revenues for authors through reproduction, retransmission, etc. In Canada, for the last 20 years, copyright has been impacted by three forces: law, jurisprudence and technology.

First, here are a few words about the law. The 2012 modifications enforced many new exceptions, among them fair dealing in education, and none of them included remuneration for authors. It was a major step back for authors.

In jurisprudence, I will remind you that, in the 1990 case Bishop v. Stevens, the Supreme Court of Canada quoted an old English decision, saying, “the Copyright Act...was passed with a single object, namely, the benefit of authors of all kinds”.

But there was a shift in 2002. The Supreme Court in the Théberge case wrote:

> Excessive controls by holders of copyrights and other forms of intellectual property may unduly limit the ability of the public domain to incorporate and embellish creative innovation in the long-term interests of society as a whole....

In 2004, in the CCH case, the Supreme Court invented a user's right, saying, “The fair dealing exception, like other exceptions in the Copyright Act, is a user's right.”

Théberge and CCH are based on a mythology that the authors may hide their work and not let the public get access to it.

Third is technology. With the Internet, access to art and the democratization of creation are great, of course, but they are pushing aside authors' rights and remuneration. We have witnessed the arrival of a new type of author who is not interested in copyright protection —such as Creative Commons, here before this committee—and doesn't need remuneration. With new technologies, legislators, not only in Canada, have kind of abdicated and let private corporations make the law. This is the case with Google, which redefined fair use and remuneration with Google Books, Google News, Google Images, and YouTube.

There is a shift that benefits everyone—the public, Internet providers and Silicone Valley corporations—except the authors. It's what we call a value gap. The combined result of law, jurisprudence and technology is a decline of copyright protection for authors.

I suggest that making the law means working with studies. What were the economic effects of the 2012 amendments? Did authors get more or less royalties?

Since the arrival of the Internet, authors' incomes have decreased. We did a study a few years ago in Quebec with the INRS and the ministry of cultural affairs, showing that revenues are becoming micro-revenues. I think Access Copyright, Copibec, L'Union des Écrivains and a lot of people came here to tell you that revenues have decreased.

On the other side, what are the revenues of Internet providers and Silicone Valley corporations? Did they decline?

Artists should be better protected as a social and cultural value. This is not a question of balance. The message is quite simple. If art matters, we must care about authors. The general principles of the Canadian act respecting the status of the artist should be followed.

I'll run through a couple of proposals.

First, as a general proposal, you should make the wording of the Copyright Act much simpler. The wording is quite a mess at some points. One example is that no one can really explain the distinction between non-commercial purposes, private purposes, private use and private studies. Confused and complicated rules are usually not followed.

Second, you can fix what was, in my opinion, broken in 2012. Take away all the exceptions of 2012, or keep them but add a remuneration mechanism. Canada has to comply, as you know, with the triple test of the Berne Convention. The idea is to replace authorization with a royalty, a global licence model like the private copying regime of 1997. The private copying regime was a way to answer to a technology that gives the public the possibility of reproducing work themselves and provides remuneration to the rights holders.

Third, add a resale right. I think RAAV and CARFAC testified in that sense. A resale right is a tangible way of expressing support for visual artists.

Fourth, create a fair dealing exception for creative work, which means to clarify the right to quote for visual artists and musicians.

Fifth, give a greater role to copyright collectives. They are the tangible way of making copyright functional by giving access and providing royalties. Perhaps you could think about extended collective licensing, and that could be an answer.

Sixth and finally, think about perhaps including a provision for professional authors, something that would be more coherent with the Status of the Artist Act and the notion of independent contractors.

I will conclude by saying that the question for us is to see from which perspective we are looking at copyright. The challenge is to act, as you know, like a legislator and not like a spectator.

Thank you.

● (1540)

The Chair: Thank you very much.

We're going to move to Ariel Katz, from the University of Toronto.

You have up to seven minutes, sir.

Mr. Ariel Katz (Associate Professor and Innovation Chair, Electronic Commerce, University of Toronto, As an Individual): Good afternoon.

My name is Ariel Katz. I'm a law professor at the University of Toronto, where I hold the innovation chair in electronic commerce. I am very grateful for the opportunity to appear before you this afternoon.

In my comments today, I would like to focus on dispelling some of the misinformation about the application of copyright law and fair dealing in the educational sector.

Since 2012, Access Copyright and some publishers and authors organizations have embarked on an intensive and, unfortunately, somewhat effective campaign, portraying Canada as a disastrous place for writers and publishers. This campaign, which I call the “copyright libel against Canada”, was built on misinformation, invented facts and sometimes outright lies. Regrettably, it has slandered Canada and its educational institutions, not only at home but also abroad.

I debunked many of the claims in a series of blog posts four years ago, when the campaign started. I encourage you to read them. I also invite you to read the submissions and posts by Michael Geist, Meera Nair and others. I'm happy to provide the links to those.

Nevertheless, the copyright libel persists. It persists because it presents three simple, correct facts, wraps them in enticing rhetoric and half-truths, and then tells a powerful yet wholly fictitious story.

Here are the three uncontroversial facts.

Fact number one is that over the last few years, and especially since 2012, most educational institutions stopped obtaining licences from Access Copyright, and Access Copyright's revenue has declined dramatically. This is true.

Fact number two is that, as a result, the amount that Access Copyright has distributed to its members and affiliates has also declined significantly. This is also true.

Fact number three is that most freelance Canadian authors, namely novelists, poets and some non-fiction writers, earn very little from their writing. This is true.

All of that is correct, but what is incorrect is the claim that the changes in Canada's copyright law and the decisions by universities not to obtain licences from Access Copyright are responsible for the decline in Canadian authors' earnings.

First of all, as you've already heard from some witnesses, even though universities stopped paying Access Copyright, they did not stop paying for content. Indeed, they have been paying more for content than they paid before. Most publishers are actually doing quite well, and some are doing extremely well.

Now you may wonder, if educational institutions aren't paying less for content, but more, then why do the earnings of Canadian authors decrease rather than increase? That seems to be the question that puzzles this committee. I'll try to help you with that.

To answer this question, we need to get into the details of Access Copyright's business model and consider things like these: Which works are actually in its repertoire? Which authors are members of Access Copyright, and which aren't? What type of content is generally being used in universities? How does Access Copyright actually distribute the money it collects?

I'll try to answer these questions. The logic behind Access Copyright's business model has been deceptively simple and attractive. Access Copyright would offer educational institutions a licence that allowed them to basically copy every work they needed without worrying about copyright liability. It would charge reasonable fees for the licence, distribute the fees among copyright owners, and everyone would live happily ever after.

This sounds great, except that this model can work only if you believe in two fictions. First, you have to believe that Access Copyright actually has the repertoire it purports to license. Second, you have believe that a cartel of publishers would provide an attractive service and charge reasonable fees. However, good fictions do not make good business models.

Access Copyright has never had the extensive repertoire it purported to license. As a matter of copyright law, Access Copyright can only give a licence to reproduce a work if the owner of the copyright in that work has authorized Access Copyright to license on her behalf. It would have been a copyright miracle if Access Copyright actually managed to get all the copyright owners to appoint it to act on their behalf. They never have been able to do that.

Access Copyright has always known that it didn't really have the legal power to license everything that it did, but that knowledge has not stopped it from pretending to have virtually every published work in its repertoire. Practically, Access Copyright has been selling universities the copyright equivalent of the Brooklyn Bridge. However, as a matter of copyright, not only can Access Copyright not license stuff that doesn't belong to it or to its members, but its attempt to do that constitutes, in itself, an act of copyright infringement.

Yes, you may find it surprising that Access Copyright has, in my opinion, committed one of the most massive acts of copyright infringement that Canada has ever seen, by authorizing works that don't belong to it or to its members.

● (1545)

For many years, educational institutions were quite content to play along and overlook the limited scope of Access Copyright's repertoire. They did that because the licence agreement contained an indemnity clause. It basically told universities, “Don't worry about whether we can lawfully give you permission to copy those works, because as long as you continue paying us, we will protect you. We'll indemnify you should the copyright owner come and actually sue you. We'll take on the risk.” As long as universities paid the sufficiently low prices, they were happy with this “don't ask, don't tell” policy. They just continued paying and thought that they were protected.

You would expect that if Access Copyright collected money for the use of works that aren't in its repertoire, it would then refund the money to the institution that paid—that overpaid—but that's not how Access Copyright works. Instead, it keeps the money that it collects for works that aren't its own and distributes this money among its own members. This is principally the money that has now all but disappeared and that you hear a lot of complaints about.

At this point, it is important to consider which authors are actually members of Access Copyright, which aren't, and what type of works are actually being used in universities.

In general, except for a handful of courses in the English departments, Canadian universities don't teach Canadian literature. When they do, students actually buy those books. As U of T historian and English professor Nick Mount recently wrote in his book *Arrival: The Story of CanLit*, “At eleven of Canada's largest twenty universities, English and French, you can complete a major in literature without any of it being Canadian.”

This may surprise you, but it shouldn't. Most Canadian universities are serious academic institutions. The works they typically use for research and teaching are academic works written by academics, some from Canada, but in many cases from elsewhere. Canadian universities are not parochial schools but serious academic institutions. They are members in good standing in the global enterprise of science. The study of contemporary Canadian literature is only a tiny fraction of that enterprise. Moreover, most academic authors, the ones who actually write most of the works that are being used in universities, aren't even members of Access Copyright.

According to Stats Canada, there are 46,000 full-time teaching staff at Canadian universities. Most of those are active authors who write and publish—otherwise they'll perish. Some faculty members are members of Access Copyright, but most are not—

The Chair: I'm sorry, Mr. Katz, but we're going a little bit over and we have a tight schedule. I will ask you to wrap it up quickly, please.

Mr. Ariel Katz: Okay.

There are 46,000 full-time academic authors employed by Canadian universities, and Access Copyright has only 12,000 writer members. U of T alone has more writer members than Access Copyright. In other words, the vast majority of works that you use in universities are not written by members of Access Copyright.

Where is this money that the authors and members of Access Copyright used to get? They don't get it anymore. Where did this money come from? It came from Access Copyright collecting money for everything, even though it did not own everything. Whatever it didn't own, it kept for itself and distributed this money to the authors. That worked as long as the model worked, but eventually it could no longer sustain the flaws that underlay this model, and it collapsed. That's the money that is now gone.

The Chair: Thank you.

Mr. Ariel Katz: It has very little to do with copyright and very little to do with fair dealing.

The Chair: Thank you. I'm sure they'll have lots of questions for you.

We're going to move on to Mr. Barry Sookman. You have seven minutes, please.

Mr. Barry Sookman (Partner with McCarthy Tétrault and Adjunct Professor, Intellectual Property Law, Osgoode Hall Law School, As an Individual): Thank you, Mr. Chair.

I wish this were a debate about Access Copyright, so I could spend my seven minutes replying to what you've just heard.

Thank you very much for the opportunity of having me appear today.

I'm a senior partner in the law firm of McCarthy Tétrault. I also teach intellectual property law at Osgoode Hall Law School. I know about copyright in theory and in practice, and I want to share some of my thoughts with you today.

A key reason copyright exists is to create a framework encouraging creators to develop and make works available and to ensure they are paid appropriately for their creative efforts. You have heard many arguments in favour of broad exemptions and free uses of works. In these remarks, I want to provide some guidance to help you analyze many of the conflicting submissions you've heard, especially by those who oppose reasonable framework laws required to support a vibrant creative community and functioning markets for creative products.

I intend to focus on decoding for you certain norm-based appeals and misleading arguments made to oppose reasonable framework laws.

You have heard appeals for exceptions to copyright relying on the norm of fairness; however, a fair dealing is a free dealing, and a free dealing should be understood for what it is. Free is not necessarily fair, nor is it fair market value. Courts in Canada have developed a unique, expansive framework for determining what is a fair dealing. But whether something is fair as a matter of law cannot be dispositive as to whether it is actually fair and in the public interest. This is especially true because the Supreme Court of Canada has ruled that a dealing can be fair even if it has an adverse effect on the market.

You should not conclude that the addition of "such as" in the fair dealing exception, as some have advocated for, would be no big deal and would simply add flexibility to the act. The appeal to the flexibility norm reflects a judgment that compulsory free dealings should be expanded to uses not expressly permitted or even imagined by Parliament. This was rejected in 2012, after being opposed by practically the entire creative sector, including in a major submission to the reform process.

You have heard appeals for exceptions in the name of balance, but the concept of balance does not provide any useful guidance for copyright reform any more than it provides a principled framework for reforms to tax, energy or other laws. You should be mindful of norm-based appeals for reforms based on balance where not supported by principled justifications. Supreme Court decisions on copyright often refer to balance, but some mythical balance in itself is not what the court teaches. Rather, the court teaches that the complementary goals of copyright are to encourage the creation and dissemination of works and to provide a just reward for the creators. These are the goals this committee should focus on.

You have heard that exceptions are needed to promote access to works and to foster innovation. Creators fully support a framework that promotes broad access and innovation, but free access as a guiding norm is not consistent with encouraging new investment by creators or paying them properly. Broad exemptions and limitations in rights also result, as Georges just indicated in his remarks, in value gaps, where creators cannot negotiate market prices and are not adequately compensated, or compensated at all.

Opponents of creator rights often justify piracy, arguing that it is fundamentally a business model, and that creators should, in effect, make content available at prices that compete with those who steal and distribute their content. This business model defies basic economics. A similar argument against providing creators the rights and remedies they need is that they are successful even despite piracy or because they're paid for other uses or have other revenues. The "they are doing just fine" argument is really a normative judgment that creators should not have a copyright framework that will enable them to achieve their full potential—what they could produce and earn but for piracy and uses not paid for.

● (1550)

The "they are making money in other ways" argument is another normative judgment that creators should not be paid for valuable uses of their works by others, such as when they innovate to bring new products to market, even though those innovations don't cover the lost revenues on the other uses.

The bottom line is that the smoke-and-mirror arguments are premised on the normative judgment that it is justifiable to acquire and consume a product or service for free, essentially forcing the creator to subsidize uses and even piracy on a compulsory basis. These are assertions most people would never advance outside of the copyright discourse.

You are told that laws that would help tackle online piracy, such as site blocking, should not be enacted. There are over 40 countries that have court or administrative website-blocking regimes. This is not some experiment, as one witness has told you. These remedies support functioning marketplaces that are otherwise undermined by unauthorized pirate services. Numerous studies and courts world-wide have found website blocking effective in countering piracy and promoting the use of legitimate websites, and to be fully consistent with freedom of expression values.

We can learn from international experience. The United Kingdom is currently studying expanding its regime to include administrative blocking. Australia has just enacted a law to expand its site blocking to search engine de-indexing.

When people oppose reasonable remedies against blatant online theft and leave no stone unturned arguing against creators having a framework law that enables them to control the uses of their works and to be paid a fair market value for such uses, you should question why. In particular, you should question what moral compass and values underlie these arguments and whether they comport with norms that this committee is prepared to accept for copyright or in any other situation.

I thank you for the opportunity to appear today, and I look forward to any questions you might have.

● (1555)

The Chair: Thank you very much.

Finally, from the Canadian Bar Association, we have Mr. Steven Seiferling. You have seven minutes.

Mr. Steven Seiferling (Executive Officer, Intellectual Property Law Section, Canadian Bar Association): I'll let Ms. MacKenzie start.

Ms. Sarah MacKenzie (Lawyer, Law Reform, Canadian Bar Association): Thank you very much.

I'm Sarah MacKenzie. I'm a law reform advocate with the Canadian Bar Association. Thanks for your invitation today to provide the CBA's input on the Copyright Act review.

The CBA is a national association of over 36,000 lawyers, students, notaries and academics with a mandate to seek improvements in the law and the administration of justice.

Our written submission, which you've received, represents the position of the CBA's intellectual property law section, which was developed in consultation with members of other CBA groups. The CBA IP section deals with law and practice relating to all forms of ownership, licensing, transfer and protection of intellectual property.

I am here today with Steve Seiferling, an executive member of the CBA IP law section and chair of the section's copyright committee. Mr. Seiferling will address CBA's comments on the Copyright Act review and take your questions.

Thank you.

Mr. Steven Seiferling: Thank you, Mr. Chair and honourable members.

Although our submission goes into a number of issues that I'm happy to take questions on, I want to focus on two that actually have something of a common theme: the best use of judicial resources, or judges, with respect to copyright law. In the two areas I want to highlight, we have created an unnecessary and burdensome use of the court system, in which court applications are required. We question whether there is something short of court applications that would apply, or that would work in many cases.

The first area, which you haven't heard a lot about, despite the number of witnesses Mr. Azzaria noted, is anti-counterfeiting and imports. You haven't heard a lot on that area.

Currently, where a brand or copyright owner has registered with the Canada Border Services Agency and an uncontested counterfeit is discovered at the time of import at the border, an importer can simply fail to respond, be hard to reach or be non-responsive in their response for a short 10-day period. That's the limit on how long the Canada Border Services Agency will hold goods without a court application. If a court application is not filed by the end of the 10 days, the goods are released to the importer.

The CBA section is proposing that for uncontested counterfeits—we're not talking about a legitimate claim about whether the goods are proper—when we have an affidavit or statutory declaration from the brand owner or the copyright owner, the goods could be destroyed or seized without the need for imposing an additional burden on the courts, and without the need for a court order.

You have heard a lot about the second area that I want to talk about. This is notice and notice.

The Internet is borderless, and our laws are not. Our current system, even with very recent amendments and proposed amendments, only allows us to deal with copyright infringement online when three things exist. Number one, the alleged infringer is in Canada. Number two, the alleged infringer can be identified, so they're not falsifying, masking or spoofing their ID or their IP address, which is pretty common when we're in this type of area. Number three, the rights holder actually files a claim. That's our system in Canada. Once again, we're taking up court time and resources.

The reality is that most infringers are not located here in Canada and they'll ignore a notice provided by an intermediary. Notice and notice ignores the borderless nature of the Internet. If we're going to absolve intermediaries of liability in Canada for infringement claims, the least we can do is adopt a notice-and-takedown system, which allows rights holders a greater ability to protect their copyrighted works and recognizes the issues posed by a global Internet.

Let me give you an example. Let's say that someone goes online to my law firm website and takes my picture. They set up an account on, say, the Toronto Maple Leafs fan site. I'm an Oilers fan, so if you put me on the Leafs website, that's not necessarily appropriate. Then they talk about how much I appreciate the Leafs, with my picture attached.

My recourse as a rights holder is to file a notice with the intermediary, with that website, which they would pass on. I get a limited amount of information back, which I may be able to use to file a claim, if I have identifiable information. The claim is useful only if the person who set up that false account is in Canada, can be identified and has not masked or concealed their true identity. Meanwhile, everyone thinks I've become a Leafs fan.

I use this example somewhat jokingly, but what if we change the facts to associate me, or anybody whose picture is available online, with organized crime or something a lot more problematic than the Toronto Maple Leafs fan site? We have the same enforcement struggles.

By continuing to use notice and notice, we in Canada fail to recognize the global nature of the Internet and its users.

Those are my introductory remarks, and I look forward to any questions you might have on that or any other issues raised by the CBA.

● (1600)

The Chair: Thank you very much.

Before we jump into our round of questions, I need to let everybody know that we need about 10 minutes at the end. We have to discuss our final three meetings and some of the challenges that have come up. We'll save some time at the end for that.

Mr. Longfield, you have seven minutes.

Mr. Lloyd Longfield (Guelph, Lib.): Thank you.

Thanks, everybody, for coming as witnesses to this important and confusing study. We have had a lot of different opinions, and we purposely brought you folks in near the end, to help us sort through what we've been hearing.

I want to start with Mr. Azzaria.

When you're talking about the author royalties and incomes decreasing, and the democratization of technology versus the creators being paid for the works they've been working on, it seems we have a lack of transparency in the system. In trying to get to where the system breaks down, do you have an opinion on where we need to be focusing our efforts in terms of creators being paid?

Mr. Georges Azzaria: There are a lot of things to say. What I was trying to say is that democratization of creation is a great thing. Your neighbour is making art, and that's fantastic, but the problem is that your neighbour is now in competition with professional artists who want to make a living with their artwork. Because he's giving away his work, he doesn't care about copyright, but the professional artist does.

There are a lot of ways we can try to find a mechanism to separate that. This is just a hypothesis. I'll just speak generally, and maybe afterwards we can make some distinctions. You could have an opt-out system, where everybody is in a collective society but then your neighbour could opt out if he wants, because he doesn't care about copyright or he doesn't need copyright to make a living. The other way would be to have something that would be coherent with the act respecting the status of the artist and the professional relations between artists and producers in Canada, which you may know.

It's actually quite an interesting act. If you read the general principles, they really focus on how artists are important to our society and everything. That's with the professional artists. That would be another way of thinking about things, saying, “Well, we have two types of creators: professionals and non-professionals.” I'm not saying they're “amateurs” and what they're doing is not good; I'm just saying that some want to make a living with copyright and some just don't care. The ones who don't care are slowly starting to argue that copyright is not important for anyone.

I don't know if that was a clear answer for you.

● (1605)

Mr. Lloyd Longfield: Yes. The barriers to entry are low, so a lot of people can get in, but we should have a way of separating out the ones who need to earn a living.

Mr. Georges Azzaria: It's a hypothesis. If you work with that second hypothesis, it would be a kind of opt-in situation. However, then you'd have to have all the collectives agreeing with that, because it might be something funny in terms of the Bern Convention.

Mr. Lloyd Longfield: Okay, thank you.

I'm going to flip over to Mr. Sookman, and possibly the Bar Association.

In looking at the five-year review that we're in the middle of right now, we had testimony last meeting that this is way too frequent, that the Supreme Court is still dealing with the previous review. Some of the cases are just getting through. We don't know whether the law is working yet, and now we're going to start changing the law.

Do you have any comments on how frequently we're doing this review? The testimony also said that we're helping a lot of lobby groups, but we're not really helping society by doing this review so often.

Mr. Barry Sookman: It's worth bearing in mind that while there's a five-year review, Parliament has quite a bit of scope to determine the extent to which they want to review the entirety of the act. Technology is changing. It's putting enormous pressure on all stakeholders. This is one of these areas. Given that copyright is such an important framework law, having it reviewed and making sure it works is important.

The other thing is that we've actually had quite a bit of Supreme Court jurisprudence on this. We can already see on the ground that there are problems and that there need to be some solutions. I would suggest that in the next five years in the Internet world, where it's seven years for one, we have to have 35 years of experience. I would say that reviewing the act every 35 years is a good idea.

Mr. Lloyd Longfield: Okay, we'll get that testimony to review that testimony.

Some hon. members: Oh, oh!

Mr. Lloyd Longfield: What does the bar association think? You also mentioned the load on the courts, which is also a very interesting piece for us to be considering.

Mr. Steven Seiferling: I'll comment on the five-year review, and then I can comment a little on the load on the courts.

As to the five-year review, all you have to do is look at the cycle of technology. We're innovating at a record speed. If we're innovating at a record speed, shouldn't our law move at the same speed, or at least try? We were playing catch-up in 2012. We were playing a huge catch-up trying to fix things that we may have identified 10 or 15 years before that. We were trying to ratify treaties that existed in the late 1990s. That's a problem.

Five years, no, that's not too soon. It's definitely not too soon.

As for the other part of your question, on the burden on the courts, clear legislation also lessens the burden on the courts. If we're able to review and refine the legislation on a more regular basis, I think that would be effective for the lawyers whom the CBA represents and for the judges who used to be lawyers, and their caseloads and the judicial burden.

Mr. Lloyd Longfield: What you're saying is that the legislation isn't adequately protecting against foreign actors.

Mr. Steven Seiferling: Yes, that's right, especially on the notice-and-notice issue.

Mr. Lloyd Longfield: I'm not going to have time for more.

I think I'll turn it back to you, Chair.

● (1610)

The Chair: Thank you very much.

We're going to move to Mr. Albas.

You have seven minutes.

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

Thank you to the witnesses today.

I'm just going to move a motion, so we can have a conversation on a very important subject. The motion reads:

> That the Standing Committee on Industry, Science and Technology, pursuant to Standing Order 108(2), undertake a study of no less than 4 meetings to investigate the impacts of the announced closure of the General Motors plant in Oshawa, and its impacts on the wider economy and province of Ontario.

I believe I can make that motion, Mr. Chair. Hopefully, you'll find it in order.

The Chair: Your motion is in order, and you are able to move it.

You have finished, so Mr. Carrie will have the floor.

Mr. Colin Carrie (Oshawa, CPC): Thank you very much, Mr. Chair.

First of all, I want to thank my colleague and everyone around the table for the last week since we had this news in Oshawa about the General Motors plant. I sincerely want to thank everyone for their comments and for reaching out to me in order to help.

I want to apologize to the witnesses. I know this is a disruption, but this is a huge issue in my community.

I was pleased to hear the Prime Minister make a commitment that he does want to develop a plan. I know this committee. I've been in this committee in the past. It's one of the least partisan committees. I think that if there's something we could do, it behooves us to do it.

I think we heard about the 2,800 job losses in Oshawa, but when you take into account the spin-offs of these jobs—anywhere from seven to nine other jobs for each—it's somewhere around 20,000 total job losses in our community. To put that in perspective, it was announced that 3,600 jobs will be lost in the U.S., but the American economy is about 10 times bigger than ours, so it would be an equivalent of something along the lines of 200,000 jobs in the U.S. Then we heard that Mexico loses basically zero jobs.

I was very pleased to let the committee know that we were able to get down there with our leader Andrew Scheer within the first 24 hours. We met with the mayors and municipal leaders. We met with the leadership at GM and with business communities, and the most important thing we were able to do was get down to the gates.

The mayor, through me, mentions to my Liberal colleagues that if they could get the message to the Prime Minister, he really would welcome a phone call to determine the effects of this closure on our community, the impacts. That's what this study is all about.

The most important thing, as I said, is that we were actually at the gates. It was one of the hardest things to see workers who found out this news on a Sunday evening when they were eating dinner, that they wouldn't have a job in the future. They were going back into the plant for the first time, and one of the comments really stuck to me. It was from a worker; I'll call her C. She was a very young lady, 30 years old. She mentioned to me that she had been working there for six years and that it was a great job, a job that allowed her to put a roof over her head, feed her kids and have a future. This was something that was going to be taken away from her. When I found out that this was happening, I asked her what message I could bring back. She said, “Please fight for our jobs and do what you can.”

So when I found out about this motion towards committee here, studying the impacts.... I think it's fairly obvious to people around the table here that the impacts are not just workers like C., but the feeder plants. I was at one this weekend in Brockville, where I could just see the United States across the way. They're constantly getting attempts to poach them over there...jobs in the community, the restaurants, the retail outlets. There are also impacts with regard to R and D, the billions of dollars that the auto industry spends at our universities and colleges. It's our educational system, future knowledge. If we lose these industries, that knowledge goes away, as well as the jobs of the future.

I think everybody would agree that the impacts are huge. This plant was an award-winning, number one GM plant. If GM can't build a new vehicle or make the case for that in Canada, we have a problem. Having this study go forward, I think, would be helping the Prime Minister. When these companies make these investments, they are once-in-a-generation investments. This is not something that they do for three or four years, or even 10 years. This is decades of investment. I think that if we can really put a highlight on this now [*Technical difficulty—Editor*].

I think it was Donald Trump trying to interrupt the committee to get his word in here.

We've been listening to businesses talk about different policies that maybe we could look at, whether it's energy cost, steel and aluminum tariffs, regulatory changes, carbon taxes, things along these lines. However, one of the things we know is that Ray Tanguay was appointed the “auto czar”, and he came up with a plan. I think this is something we could take a look at in this study.

● (1615)

All Oshawa workers want is the opportunity to be able to bid on a new investment—a product, a job. In the past, whenever we've had this opportunity, we've been very resilient. We've been very innovative. We've actually won it when we've had the chance to compete. The hope here is that General Motors didn't say they were going to bulldoze the plant; they said there's no product allocation after 2019.

So there is hope, colleagues. Workers and community leaders in my community want to help the Prime Minister with his plan. He was in the House of Commons saying that he's working on it, but we need to start immediately. I don't know if I can tell you how urgent it is. We have to discover the impacts and develop a plan, because the clock is ticking.

With that, Mr. Chair, I want to thank you, and I want to thank our witnesses today for letting me speak up for my community at this very difficult time.

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

Mr. Masse, you have the floor.

Mr. Brian Masse (Windsor West, NDP): Thank you, Mr. Chair.

My heart goes out to the families and the workers of Oshawa. General Motors closed in my community after a hundred years of operations, to the exact year. Since 2002, I've been advocating in the House of Commons for a Canadian national auto policy, similar to the calls of the CAW, as well as other economists who have called for this.

Other nation states actually have a specific auto policy. In fact, a number of those states have now usurped Canada's position as the number two auto manufacturer and assembler to move us now to 10th in that model. We've shed tens of thousands of jobs in that tenure. In fact, we have slid so significantly that it has even affected our North American supply chain. That has been unfortunate, because one auto job equates to seven other jobs in the economy. This is the pain and suffering the member for Oshawa sees. My heart goes out to him and his community, because it's not just those who go to the plant every single day.

It's important to note that in a national auto strategy that we laid out with the late Jack Layton back in 2003—even David Suzuki was part of it—in terms of a green auto strategy, specific elements were taken from many other jurisdictions because of the transition. You have workers in Oshawa and other places who have quite literally been the best. They've been the best, as shown through the powertrain awards they've received for their work, and it hasn't been enough. That's one of the problems we're faced with in this industry.

The motion we have in front of us is reasonable in four meetings. In fact, if it could be more comprehensive, that's certainly something I would support. But it's important to note, Mr. Chair, that other countries, again, are still going forward with their policies.

Germany has a policy. South Korea has a policy. The United States has a series of trade barriers, and the most recent USMCA has a series of barriers related to investment. They actually cap our investment and they also create new taxes, which are part of the forthcoming agreement. That would be appropriate, because we are competing. I will note, as the member has noted, that the Ray Tanguay report was tabled in 2017—this is the auto czar. Unfortunately, we haven't seen action on that particular file yet. It's almost a year in the making. It will be a year in the making a month from now.

Time is of the essence. I can remember this debate going back as far as when I found the Liberal auto policy in a washroom here in the House of Commons. It's a true story. This is well articulated in the chamber. We called for one. We almost got one at one point. At that time, Minister Cannon for Paul Martin was ready to table a policy, but when he switched and crossed over to the Conservatives, he never followed through on that.

We still need to have some resolution to having an overall plan. This is the first step to having it. We have heard from the Prime Minister that there would be some interest in doing so. I would encourage us to do the four meetings that are necessary. I would also be prepared to meet additionally to that. I don't think this has to interrupt any of our committee business whatsoever. I would hope that the movers of the motion would accept that.

I'll conclude, so that we can get to our guests, but I think it's important to note that we have an opportunity to do this. We have the time available in our schedule if necessary. I would encourage all members to do so.

Thank you for your time.

● (1620)

The Chair: Thank you very much.

We're going to move to Mrs. Caesar-Chavannes.

Mrs. Celina Caesar-Chavannes (Whitby, Lib.): Thank you, Mr. Chair.

I do appreciate the opportunity to speak to this. Our hearts certainly go out to the people of Oshawa. I know that in Whitby there are many organizations that contribute to the ecosystem that is a part of the GM ecosystem much more broadly.

Mr. Chair, as the member for Oshawa has said, the news is hopeful; there has been no allocation of new product, but that can still change. The other alternative is that, if it actually does close down.... The member for Oshawa talked about developing a plan and having these four meetings to investigate the impacts be part of what is necessary to develop a plan.

I really believe that the educational institutions, business leaders, municipal governments, the workers, and people who are involved in the ecosystem should be able to lead the charge in coming up with this plan. They are closest to the source. They are closest to what the impact is going to be, so they really need to be a part of what that plan starts to look like and how it does take shape.

I know there are talks with the Prime Minister, as you noted, to make those phone calls. Again, a made-in-Ottawa solution for what is happening in Oshawa is not reasonable. It will require a long-term strategy to be able to ensure that we have the jobs of today and tomorrow. Those who are closest to the situation can come up with the best plan and the best assessment of what is happening in Oshawa and the surrounding area, the Durham region.

With that, I would move that we call the vote.

The Chair: Is there any further debate?

Dan, go ahead.

Mr. Dan Albas: Mr. Chair, we've heard quite eloquently from the member for Oshawa about the need for us to be with the community and to show some leadership in recognizing the wider economic benefit of that industry, not just in Oshawa but in this province and this country.

I am disappointed to hear that members opposite don't believe that we can be leaders in helping to foment that reaction so that the community can benefit from ongoing economic development.

The Chair: Thank you.

Mr. Carrie, go ahead.

Mr. Colin Carrie: I just have a quick note for my colleague from Whitby. Respectfully, we did get a chance to meet with our business leaders and the educational leaders. I just want people around the table, before they vote, to know that they actually are willing to work with us. They are willing to get on a plane. They are willing to come here to make sure that we get something moving as soon as possible, but they are looking for some leadership.

There was some hope when the Prime Minister said he was committed to a plan, and they are right on board because we know that when we work together, we can be very resilient. Oshawa's had these bad announcements before. We've always gotten through it.

What they've asked me to do is see what we can do here in Ottawa. They've actually asked for that. Before the vote, just so you know, they will be there to help us.

The Chair: Thank you.

Hearing no other debate, we will go to a vote.

Mr. Colin Carrie: Could we have a recorded vote?

The Chair: We will have a recorded vote.

(Motion negatived: nays 5; yeas 4)

● (1625)

The Chair: Thank you for your intervention.

Mr. Albas, you still have about three minutes left.

Mr. Dan Albas: Thank you, Mr. Chair.

I'd like to start with Mr. Katz.

Mr. Katz, you've written that South Africa's fair use rights should be a model for the world. Could you explain what their framework is and why you think other countries should copy it?

Mr. Ariel Katz: South Africa basically has followed something that the United States and Israel have been doing for many years. I argue that it has also been the law in Canada for many years, even though we don't really know that this is the law. We don't have such magic words in the fair dealing provision.

The point is that they would be moving into adopting fair dealing as an open, flexible, and general exception that could apply potentially to any purpose, subject to a criterion of fairness, as opposed to a system where by default, unless Parliament had contemplated a particular use in advance, it is unlawful unless the copyright owner agreed to do that.

The problem with the model that relies on specific exceptions and a closed list of exceptions is that it requires Parliament to have the magic ability to foresee things that happen in the future. When we're talking about innovation, by definition the nature of innovation is that there are things we don't think of as existing today. If innovators, in order to do what they're doing, need to get permission or go to Parliament and get Parliament to enact a specific exception to do that, very few innovators would do so, because if you are a true innovator, the limited amount of time, money, and effort you have, you want to put into your innovation. You don't have the money to hire or entertain lobbyists.

A system that relies on closed exceptions necessarily reflects the interests of the status quo and does not allow breathing room for true innovators. However, an open and flexible system gives true innovators an ability to at least have their day in court. They could come and say that what they're doing is actually fair. They could show the benefits, show why the harms do not exist or are exaggerated and why the benefits outweigh the harm.

They can do that. If they have a good case, they will prevail. If they don't, they won't. However, at least they have the opportunity of doing that. If what they have to do is convince Parliament to allow them to do that, they won't do it.

Mr. Barry Sookman: Mr. Albas, could I spend two minutes just to provide some additional insight on that?

The Chair: You have one minute.

Mr. Barry Sookman: Okay.

A famous U.S. lawyer who was very familiar with fair use in the United States, Lawrence Lessig, said that fair use in the United States is just the right to hire a lawyer, because there's a tremendous amount of uncertainly. Nobody knows until it's over how it's going to work. It creates a great amount of uncertainty and litigation.

We have experience with fair dealing in Canada, with lots of cases, and it is not working in Canada.

The other thing we need to really understand is that if we open up the purposes, the existing framework we have for assessing what's fair would apply, and our framework is far different from what's in the United States or elsewhere. In fact, it's probably way broader than in the United States. Thus, if we do that, we have to recognize that it will be the courts that will be making policy for Parliament, and lots of individuals will not be able to enforce their rights. There will be fights between large platforms with lots of money perpetuating the current imbalance that exists in Canada today between the small artist-creator and the big platform.

It would be a huge setback for creators in Canada should we adopt that.

Mr. Dan Albas: Okay, thank you for that. I'm sure we'll have many duelling banjo questions for the two of you, so thank you very much.

● (1630)

Mr. Barry Sookman: We agree on almost everything.

The Chair: Mr. Masse, you have seven minutes.

Mr. Brian Masse: Thank you, Mr. Chair.

To start, what would be the top two things to create clarity in the structure of a system of rules in place that might be the easiest things to do? We're getting, obviously, two sides, but even more than that in terms of copyright. What would be the prioritization?

We have a number of things that are going on. Could you scope it down to two things to work on right away? I know that's hard.

Mr. Georges Azzaria: The prioritization is to prioritize. The law was meant for authors, and you should still put the authors at the centre of the law, because everybody has invited themselves into the copyright law, all kinds of users, specific users and so on. It's not really a copyright law anymore; it's a party to which everybody is allowed to go. I would go back to a copyright law where the author is at the centre of it.

I'm not saying you don't have to have exceptions, but you have to say that it allows the authors to be at the centre. That would mean either that the author authorizes uses or that he is compensated if he can't authorize.

If you have that, you have a framework that respects the author. He authorizes, so he says yes or no; or, with the private copying regime, he doesn't have the right to authorize and the public can have access, but we put a mechanism where he gets remuneration.

Mr. Brian Masse: Thank you.

Mr. Katz, go ahead.

Mr. Ariel Katz: Are you asking about my recommendations?

Mr. Brian Masse: You have about a minute. I'm going to insist on this or I'll just move on.

Mr. Ariel Katz: I would try to scale down the act by getting back to first principles. Focus on defining certain rights that are narrow in scope. Identify, for example, that if you're an author, somebody cannot make an identical or near-identical copy of your book and sell it.

That's easy and makes a lot of sense, but the moment you start expanding the rights over further and further types of uses, you increase uncertainty. Then you need to introduce a lot of exceptions and you create an unmanageable piece of legislation. We're getting there, unfortunately.

Mr. Brian Masse: So you'd cut it off at....

Mr. Ariel Katz: Yes.

Mr. Brian Masse: Mr. Sookman, go ahead.

Mr. Barry Sookman: Thank you very much, Mr. Masse. It's a great question.

I don't think we can rewrite the act, but there are some things we can do that would have the most potent effect.

Mr. Brian Masse: Give me two, really quickly.

Mr. Barry Sookman: The first one is that we improve enforcement through site blocking and search engine de-indexing. There's quite a bit of uncertainty in this area. There are powerful reasons why we should have it by court, and I'm happy to answer that if there's a question about it.

The other one is that we need to create incentives to require payments when tariffs are set. Harmonizing the statutory damage regime would be easy; it wouldn't require a lot of words. It would promote a reorganization of people's priorities, and we would have authors getting paid.

Mr. Brian Masse: You would like to see some consistency there.

Mr. Seiferling, go ahead.

Mr. Steven Seiferling: Fortunately for me, I highlighted two areas when I gave my introductory remarks, so I'll just repeat them in a very concise way.

Mr. Brian Masse: Yes.

Mr. Steven Seiferling: The first one is anti-counterfeiting, dealing with the brand owners and the copyright owners who've registered with CBSA and need these additional non-judicial mechanisms to protect their brands, to protect their goods.

The second one is recognizing the global nature of the Internet and recognizing that we protect based on Canadian laws. We can't cross those borders, so how do we do that most effectively? With respect to copyright infringement online, that's a notice-and-takedown system rather than notice and notice.

Mr. Brian Masse: You need international treaties to do that.

Mr. Chair, how much time do I have left?

The Chair: You have about three minutes, or two and a half minutes.

Mr. Brian Masse: Good.

In terms of the Copyright Board right now, its current status, and the proposals that have been made to the minister, do you have any opinion in terms of where it's going?

If you do, you have about 30 seconds. I know this is quick, but I don't have much time. If you don't have anything, please pass.

Mr. Georges Azzaria: I'll pass.

Mr. Ariel Katz: The criteria introduced in the bill are, by and large, a good idea. I have a problem with the public interest criterion, because that could mean anything.

The main criterion there, that the tariffs be set to try to imitate as far as possible what would have been charged in a competitive market, is the right thing to do. Introducing public interest, in principle, is a good thing, except that the board could then introduce anything under “public interest” and could actually empty out all the other criteria.

● (1635)

Mr. Brian Masse: You're worried about the mechanics of it.

Mr. Ariel Katz: I'm concerned about what's going to be put into the public interest.

Mr. Brian Masse: Thank you.

Mr. Sookman, go ahead.

Mr. Barry Sookman: I'd give the government 95% in terms of what they've done. I take off two and a half marks because of the public interest. Competitive market is the way to go. It creates less uncertainty and the speed would be much better.

My last point is that they should have addressed harmonization of statutory damages across all collectives. That's a loss of two and a half marks there.

Mr. Brian Masse: Okay.

Mr. Steven Seiferling: To be fair, there were a lot of issues with the Copyright Board in the past, and anything would have been a step up. This is generally, from the CBA's perspective, viewed as a positive, with the one condition that we take a wait-and-see approach. When it has taken more than seven years to implement a three-year tariff in the past, we're hoping we'll see some significant improvement on that, and quickly.

Mr. Brian Masse: Speed is of the essence.

Mr. Georges Azzaria: I didn't want to repeat what the critics said —

Mr. Brian Masse: That's okay.

Mr. Georges Azzaria: —but you heard here about the Copyright Board, that it's too slow and doesn't pay enough. A lot of people—

Mr. Brian Masse: It's the speed as well.

Mr. Georges Azzaria: Yes, that's it.

Mr. Brian Masse: Great.

Speaking of speed, I know I'm out of time, but thank you for being so quick. I appreciate it.

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

Mr. Graham, you have seven minutes.

Mr. David de Burgh Graham (Laurentides—Labelle, Lib.): I'll try to use it wisely.

Mr. Sookman, my first question is for you. From your comments earlier, do you believe that copyright is an absolute property right?

Mr. Barry Sookman: The rights that are established under the Copyright Act take into account the public interest. I don't think anybody has an absolute property right. It isn't in real property; it isn't in tangible property; and it isn't in copyright.

I do believe, however, that effective rights and effective remedies are essential, just as they are to any other property owner. We have laws against theft. We have laws against stealing. These are meant to protect property and to ensure that owners of property can exploit it in a marketplace.

I believe those same principles apply to copyright. It's not absolute, but they should be like property rights, to enable rights holders to have a framework they can use to develop new products, market new products, and license products. That does two things: It creates the products and it provides a consumer benefit. The idea that somehow there is this duality of completely divorced goals of copyright, whereby one side wins and one side loses, is really wrong. As with other property rights, copyright provides a mechanism that enables copyright owners to provide consumers with what they want: new products, new services and new innovation models. We're seeing that in the marketplace.

The problem is that there are these exceptions to property rights, which are in fact creating uncertainties, undermining markets. As with other property, we need to have a regime that protects property appropriately in the public interest.

Mr. David de Burgh Graham: Mr. Katz, do you have a response?

Mr. Ariel Katz: Some of the most innovative countries, such as the United States, have the open and flexible fair use principle that Mr. Sookman is strongly opposed to. Also, they don't have site blocking, which he advocates for. I think you should be aware of that.

Mr. David de Burgh Graham: I have three or four segues to where I want to go next. Thank you for that.

Mr. Sookman, you were an intervenor in Google v. Equustek. Can you give us a 10-second background on that and which side you took? You were quite public about it at the time.

Mr. Barry Sookman: I was.

The Google v. Equustek case was the first case that established the possibility for global de-indexing orders against the search engine. We appeared in the British Columbia Court of Appeal and the Supreme Court of Canada, supporting the possibility that intermediaries whose systems were used to facilitate a wrongful act or whose systems were used to help defy a court order could be subject to orders of a court.

● (1640)

Mr. David de Burgh Graham: In that case, the rules we have were able to be used to accomplish that.

Mr. Barry Sookman: They were.

If your question is why we need a regime for site blocking, which I think is what you're getting at—

Mr. David de Burgh Graham: Yes.

Mr. Barry Sookman: —then let me tell you why.

First of all, the site-blocking regimes around the world have proved to be effective and to work. Some of the detractors of it oppose site blocking before fair play and say, “Let's have courts do it.” Then they show up before this committee and say, “No, let's not have courts do it.” Therefore, what's the effect? They say, “Let's just leave it.”

When we come to site-blocking orders, although I believe the equitable jurisdiction does exist in the courts, there are questions of public policy that are for Parliament to really flesh out. Let me give you some examples.

There are going to be questions about what type of sites should be blocked. Should they be primarily infringing, or should they be something else? What factors should the court take into account when deciding to make an order? Who should bear the cost of site-blocking orders? What method should be ordered to be used for site blocking? Then, how do we deal with the inevitable attempts to circumvent these orders, which, by the way, courts have said don't undermine their effectiveness?

I believe those questions are fundamental ones for Parliament. Courts can make them up, but we might end up with one or two trips to the Supreme Court and with rights holders and users spending a ton of money.

Australia enacted specific legislation. Singapore enacted specific legislation. The EU has it through all member states. Why? That's because they recognize it's the most effective way to deal with foreign sites that disseminate piracy, and because they want to establish criteria as to what the proper framework is.

We need that framework. Courts can make it up, but there are going to be debates and they may not end up where Parliament would end up. That's why Parliament should deal with it.

Mr. David de Burgh Graham: Okay.

Mr. Katz, you made quite a few expressions.

Mr. Ariel Katz: Yes. When you think of whether site blocking is effective, you have to think, effective in what? One question is whether it's effective in blocking those sites. It might be, even though people can work around that. That's one type of effectiveness. However, if the question is whether it's effective in stopping piracy, or even better, in transforming the pirates into actual paying customers, the studies that Mr. Sookman and his clients have relied on do not show that. They show very little transformation within a period of time after the blocking orders have been done.

Mr. David de Burgh Graham: That's right.

Mr. Ariel Katz: If you want to stop piracy, the question is, what causes piracy? As I wrote in my report with respect to the CRTC, and I blogged about it, we don't have a piracy problem; we have a competition problem. We have a highly concentrated telecom market. We have incumbents that control the market, and they block the content. People want to watch the content, but in order to watch certain content, you have to subscribe to premium packages from the cable companies. For people who cannot afford doing that, if they can't obtain the content legally, they go elsewhere.

Mr. Barry Sookman: You should read Professor Danaher, who actually does study this issue. He has found several studies saying that in fact it promotes the purchase at legal sites—

Mr. Ariel Katz: That's exactly the study—

Mr. Barry Sookman: This committee should understand the facts.

The Chair: Excuse me—

Mr. Ariel Katz: That's exactly the study I was referring to.

The Chair: Excuse me. Thank you very much.

Mr. David de Burgh Graham: Chair, could we have some popcorn?

The Chair: No, we're not going to have popcorn.

Mr. Brian Masse: On a point of order, I would expect that the witnesses wouldn't have a debate amongst themselves.

The Chair: That is why I stopped them.

Mr. Brian Masse: Showing a bit of respect back and forth for the testimony would be appreciated. This is going in the wrong direction.

The Chair: Thank you very much. That is why we stopped that.

Mr. Graham, you have 30 seconds.

Mr. David de Burgh Graham: Thank you for that. I think it was helpful. We'll figure it out.

Is it reasonable not to ask a court whom they can block? To me, it seems a really strange thing to say we can just arbitrarily block a site. There should be some court oversight. Is that unreasonable, that courts would oversee it?

I'm asking whoever wants to answer it within the 10 seconds I have.

● (1645)

Mr. Barry Sookman: When it comes to blocking, the regimes around the world have done it in two ways. They either have court orders, or they've done it through administrative agencies, which have all the hallmarks of judicial oversight. We have Greece, Spain and others, about seven countries around the world that do it administratively with the process. I don't think it has to be a court, but it has to be a body with the expertise and the lawful authority.

The Chair: Thank you very much.

We're going to move to Mr. Lloyd. You have five minutes.

Mr. Dane Lloyd (Sturgeon River—Parkland, CPC): Thank you.

I love debating. That's why I got into politics. There is no offence taken by me here.

My first question is for Mr. Sookman. Do you think most people are aware they're actually pirating, or is it just something they think it's innocent, where they're on a website and it must be legal because they saw it?

Mr. Barry Sookman: Mr. Lloyd, that's a great question. I appreciate that you like debates. Thank you.

It depends on whom you're talking about. One of the things about notice and notice, which does have its drawbacks, as Steven mentioned, is that when users who don't know what they're doing get the notice, they often do stop; or when they get the second notice, they often do stop. There are some people who do it as a matter of convenience. They think they can get away with it. They don't think they're going to get caught, and then when they or their parents get the notice, they say “Oops.” There are others who do know and don't care.

Mr. Dane Lloyd: May I interrupt? I appreciate that. Thank you. I have only five minutes.

I would say that, from what you said, most people aren't aware. They stop when they get a couple of things. However, I think Mr. Katz is quite right that if somebody is really determined to get it, it's very difficult to stop them. If we're talking about dealing with the majority of the issues, you would say with your site-blocking proposal, as with the notice on notice, that people will see that the site is blocked and they'll say, “Oh, it must be pirated; I shouldn't be doing that.”

Would you say that's effective?

Mr. Barry Sookman: You're exactly right. There has been a lot of study of this by courts in the United Kingdom. The argument that has been put to those judges is that these orders are easy to circumvent, and they will be. The judges have actually found and expressed the opinion that in fact most users are going to abide by the order. They're not going to circumvent; they don't have the technical skills. Only a small number would, but that small number doesn't undermine the fact that these orders are effective.

Mr. Dane Lloyd: Thank you, Mr. Sookman.

Mr. Azzaria, I see you're itching for a question, and I do have a question for you.

Basically, you said that you think the system needs to be simpler, and I think Mr. Sookman also mentioned avoiding the legal costs. Would you have a recommendation as to how we can make the fair use system simpler, so that authors can be compensated and so we can also avoid all this legal back and forth?

Mr. Georges Azzaria: As I said, maybe something close to the private copying regime with a type of compensation would be good.

What I was saying is that, generally speaking, I find the copyright law much harder to read. Each time there's a modification, we just add pages and pages.

Mr. Dane Lloyd: Where would you recommend a clarification? We have private study; we have education; we have all these different exceptions. Is there a way we can roll it into something that's much more efficient and clear legally?

Mr. Georges Azzaria: I even said you could add one for creative work by artists. A lot of contemporary art works with appropriation. I find some types of appropriation are on the good side of the fence, maybe not what Jeff Koons would do, but other kinds of appropriation. Actually, each week I have someone writing to me to say, “This is my work. Do you think it's appropriation or not?” There are no decisions in Canada on that question. There aren't big guidelines in Canada in the jurisprudence.

Mr. Dane Lloyd: Then this committee would be successful if we were to actually recommend something that's much simpler.

Mr. Georges Azzaria: Yes, and remember that CCH is about lawyers not wanting to pay for photocopies. It's not about creative fair use or fair dealing, so that's one thing.

If you want to rewrite the Copyright Act, the test would be to give it to a second-year student in a law faculty just to see what they understand.

Mr. Dane Lloyd: Thanks. I appreciate that.

I have to cut you off because I have to get my next question in to Mr. Katz.

You talked in your testimony about cases where Access Copyright was infringing on the copyrights of people. Can you tell me about some of those cases?

Mr. Ariel Katz: Do you mean decided cases?

Mr. Dane Lloyd: Yes.

Mr. Ariel Katz: No. They have been doing that. They still do that. They authorize the use of works that aren't theirs.

Mr. Dane Lloyd: Do you have any evidence?

Mr. Ariel Katz: I have evidence that they do that, and in my opinion, this constitutes copyright infringement. The Copyright Board agreed that—

● (1650)

Mr. Dane Lloyd: Are there any copyright holders who are saying Access Copyright is stealing their information?

Mr. Ariel Katz: I'm a copyright holder. Some of my works are used by Access Copyright. They are happy to license them, and they don't have the right to do that.

Mr. Dane Lloyd: Okay.

Mr. Ariel Katz: Also, they're happy to collect money for that.

Mr. Dane Lloyd: That's interesting.

Mr. Ariel Katz: Can I sue them? I may have other things to do with my life.

Mr. Dane Lloyd: I think we all do.

I have only 20 seconds left, and I see Mr. Sookman is asking to comment.

Mr. Barry Sookman: In that 20 seconds, I'll comment that Access Copyright has had numerous tariffs certified by the board. Their repertoire has been challenged. It is simply nonsense to assert that they don't have rights to license.

Mr. Dane Lloyd: Thank you very much.

I'll take my three seconds to say thank you to all the witnesses. It's much appreciated.

The Chair: Thank you for managing your time.

We're going to move to Mrs. Caesar-Chavannes for five minutes.

Mrs. Celina Caesar-Chavannes: Thank you very much.

Thank you to all the witnesses.

To the Canadian Bar Association, if I'm reading this correctly, your recommendation is to consider implementation of the notice-and-takedown system. In the written statement you've provided, you say that neither system, notice and notice or notice and takedown, is perfect. You go on to say that “a notice-and-takedown regime can result in Internet service providers removing content following an allegation, without evidence or warning to the alleged infringer.”

Why are you recommending notice and takedown, and not to improve the effectiveness of notice and notice to redress online infringement?

Mr. Steven Seiferling: That's an interesting question. I would turn it back to you and say, what do you mean by improving the effectiveness of notice and notice?

Are you proposing something such as I heard in a comment earlier, that the international treaties govern what we can do with people who are posting or infringing copyright from overseas? I don't know of an international treaty that lets me enforce against somebody who is overseas, so I don't know where you're going in terms of improving the notice-and-notice system.

Mrs. Celina Caesar-Chavannes: I'm just asking a question.

Mr. Steven Seiferling: It's an interesting question, but when it comes to that, yes, we acknowledge that neither system is perfect. You're never going to find a perfect system. You're always striving for perfection.

The more effective system of the two is going to be notice and takedown, because it gives the rights holders the strongest protection they can have against the use of infringing content online, and potentially problematic infringing content online.

Mrs. Celina Caesar-Chavannes: You also talk about the anti-counterfeiting section. You recommend that simplified procedures be adopted to permit the relinquishment of uncontested counterfeits, and that the importer, in a failure to respond to any accusations against them, be required to relinquish the detained counterfeits, or the CBSA has to relinquish the detained counterfeit to the rights holder.

Can you explain a bit further what you would like to see happen with that particular recommendation?

Mr. Steven Seiferling: It's kind of like what Mr. Sookman was talking about with the site blocking. It's more of an administrative regime. There is an ability for somebody at the Canada Border Services Agency to accept an affidavit or a statutory declaration from a copyright owner or a rights holder or a brand owner saying that these are counterfeit goods.

Then you go back to the importer. If they say nothing or if they admit that these are counterfeit—I'm talking about uncontested goods here—there is an opportunity to seize or destroy the goods right away, without any further action required, without having to go to the courts.

That is an administrative process that prevents an extra burden on our judicial system.

Mrs. Celina Caesar-Chavannes: Thank you.

Mr. Katz, I want to go back to a submission that was made on behalf of the Canadian intellectual property law scholars, of which you were a signatory. One of the recommendations was on open access to scientific publications.

Are researchers amenable to that recommendation? Does the research community writ large want that to be part of a copyright regime?

● (1655)

Mr. Ariel Katz: In my experience, it does, yes.

Academic publication suffers from an underlying kind of absurdity. Most of the studies are funded by the the public. They pay our salaries. They pay the grants that we get to do those studies. We do all the work.

Then, because of the way the commercial publication industry is structured, we get commercial publishers, to whom we tend to assign the copyright. They become the copyright owner, and then they sell it back to universities and to the public at steadily increasing prices that are non-sustainable. The authors don't see a penny out of those subscription fees that we continue to pay.

The public is paying twice. First, the public is paying for the research, and then the public is paying for getting access to the research. With the people who write those studies, their goal generally is to get them disseminated as widely as possible, but then you get the paywalls interfering in between.

Generally, this is something that academic authors, in my experience, would support.

The Chair: Thank you very much.

Mr. Albas, you have five minutes.

Mr. Dan Albas: Thank you, Mr. Chair.

Going over to the Bar Association, we've heard testimony that notice and takedown doesn't work. In fact, I've heard from creators who have had the system abused by rights holders and copyright trolls. These systems are often automated and throw out takedown notices without an actual person checking on whether the site includes infringing content.

Why should Canada embrace such a framework?

Mr. Steven Seiferling: Once again, we admit that neither system is perfect. The notice-and-takedown system is not perfect, and the notice-and-notice system is not perfect.

You're perfectly correct in saying that there are automated systems out there that are sending out notices under the notice and takedown. There are algorithms that are programmed to scour and search YouTube-type sites to automatically send out those notices—the DMCA notices, in the U.S. That happens.

If you craft a notice-and-takedown system, you can put checks and balances in place that prevent that type of abuse. They've talked about the fair use exceptions in the U.S., and a requirement for the intermediary to possibly consider those fair use exceptions in the U. S. before the takedown. That's one of the things they've looked at. That might not be the best solution, but you could put some checks and balances in place.

The end of the line—the overall answer—is that the notice-and-takedown system is more effective than the notice-and-notice system.

Mr. Dan Albas: Okay.

Again, we have an example of where a TV network took a clip from YouTube, inserted it into a network TV show, and then sent a takedown notice to the original uploader for violating their own copyright.

Sir, I'd just simply point this out: If it's not necessarily working in the ways that we'd want it to in the United States, why would we be looking at it here?

Anyway, on to Mr. Sookman—

Mr. Steven Seiferling: Can I respond to that?

Mr. Dan Albas: Mr. Sookman, you have written extensively on the negative impacts of piracy and why efforts like site blocking are needed. We've heard testimony that music piracy is falling due to options like Spotify.

Do you believe that the only way to lower the instances of piracy are options like site blocking? It sounded from your testimony that you don't believe it is a competitive market issue but an issue of law.

Mr. Barry Sookman: When it comes to piracy, there's no silver bullet. Multiple tools are needed to address piracy.

You can look at the statistics. Let's say you look at TV piracy. The Armstrong Consulting report showed that the loss is between $500 million and $650 million per year. These are real numbers in just one segment, TV piracy, because of Kodi boxes and pirate streaming sites that are foreign.

You can have litigation against them and get an injunction against a site that's under a rock somewhere and that no one can find, and it's not going to be effective. When you look at the source of this massive piracy, you see that generally it is foreign. Since there isn't another effective remedy that you can get, I do believe that the most effective remedy, the one that's been recognized around the world as being effective—not the only one—is site and de-indexing orders.

Mr. Dan Albas: Mr. Sookman, I appreciate that you have both the theoretical and the practical experience of working in this space, and I value that, but the CEO of Valve Corporation, Gabe Newell, said that "there is a fundamental misconception about piracy. Piracy is almost always a service problem and not a pricing problem."

He argues that if products are conveniently available in the form that consumers want, people will pay for it. Here is someone who is out there fighting in that marketplace and looking for that share, who is saying that it's fundamentally a service issue rather than a legal one.

● (1700)

Mr. Barry Sookman: That's a great narrative, and those who oppose effective rights and remedies often use that narrative. I don't accept it. If you look at the Canadian marketplace, you see that it has a plethora of rights as far as TV and streaming go. We have Netflix and a lot of other services, and in the music space we have a lot of different services, yet we have a tremendous amount of piracy.

I'm not saying that having competitive products and services available isn't something we should have and that it isn't a factor in reducing unauthorized services. Of course it is, but should legitimate operators be required to lower their prices to compete with those who are stealing their product at the price of zero? No. We don't say, for example, that manufacturers of spare parts who could be doing stuff at Oshawa should have to compete with chop shop dealers who are stealing cars and then selling those parts at discount rates. I—

Mr. Dan Albas: I would also argue, though, sir, that there's a difference when you're talking about real property versus something that is digitally created. The transactional costs often work out differently. I would like us not to muddy the waters. As you very rightly point out, there's a difference when someone has a real product that has been stolen and then changed, but we are talking about products and services that are often intangible in nature.

Thank you.

Mr. Barry Sookman: We have—

The Chair: Thank you very much. I'm sorry.

Mr. Jowhari, you have five minutes. You'll notice the theme. We have to keep it short.

Mr. Majid Jowhari (Richmond Hill, Lib.): Oh, I wasn't on the list. Sorry.

Mr. David de Burgh Graham: I could do it, if you want—

The Chair: You have five minutes.

Mr. David de Burgh Graham: I'll go back to the very beginning. Mr. Katz made extensive comments about Access Copyright, and Mr. Sookman expressed an intention to respond. While I don't want to get into a debate like we had before, I kind of do.

Mr. Sookman, if you could take a minute to respond to the earlier points and why you disagreed so vociferously, perhaps we can get into the weeds on this a bit. I think it's important for us to do that.

Mr. Barry Sookman: I'll give you a couple of points, given the time I have.

First of all, he said that there's no repertoire, and I've already dealt with that. Boards have certified tariffs, and they've looked at the repertoire. To say that they have no repertoire is just not right.

Second, the board, Mr. Graham and everyone else, has taken into account in certifying tariffs.... When a board certifies a tariff, they look at the usage across the sector—whatever it is, education or others. They take into account fair dealing, and they take into account other licence uses, and where there are reproductions they exclude those from considering the rates. In one tariff, they concluded that fair dealing was 60%, so they set the rate based on 40%, a much lower rate.

Access Copyright collects—or used to collect, or had a right under the tariffs to collect—against institutions the amount of the tariff, so what we have going here is a mechanism whereby individual authors and individual publishers cannot make a claim for royalties. They need to collectively license. The Access Copyright regime was something that worked well, until 2012. Authors were being paid, and publishers were being paid, Then it dried up, and it dried up as—

Mr. David de Burgh Graham: Mr. Sookman, I don't have much time. I'd love to have another three hours on this, I really would, but we don't have time.

Mr. Katz's point earlier was that he is a copyright holder and Access Copyright collects for him but he has not granted them permission to do that. How do you respond to that?

Mr. Barry Sookman: He hasn't been paid because the educational institutions are not paying. If they did, he would he get paid.

Mr. Ariel Katz: I haven't given them permission to collect on my behalf, but they do it nonetheless.

The Chair: Mr. Katz—

Mr. David de Burgh Graham: Mr. Katz is making the point that I wanted to make. We're talking about Access Copyright claiming copyright of all the material that's in the universities and anywhere else prior to 2012. It's the same thing. That fact hasn't changed, but the great majority of the producers of that content aren't members of Access Copyright and have not given that permission to Access Copyright, so on what basis can it collect money that is not distributed to all those copyright holders just because they haven't registered?

● (1705)

Mr. Barry Sookman: Access Copyright doesn't represent every author in the world, but it represents—

Mr. David de Burgh Graham: It's just in Canada.

Mr. Barry Sookman: Just like any other collective, Mr. Graham, it represents a very large percentage of authors and publishers. That system was potentially viable. I'm not saying they represent everybody, but no collective represents everybody.

Mr. David de Burgh Graham: Mr. Katz, go ahead.

Mr. Ariel Katz: For Access Copyright, if you go to their submissions and to their documents, they say that you can copy every published work, except specific works that appear on an exclusion list. In order for it to appear on an exclusion list, someone has to actively tell them, "Take me out." That's how they structure their business.

This is not how the law works. The way the law works is that they can only license works when the copyright owners authorize them to act on their behalf. That's how they work.

Now, if you want to read more about what the Copyright Board said about the repertoire most recently—I think it was the 2015 K-to-12 tariff—there is a rather extensive discussion on the repertoire and lack thereof, and why it would be infringement to authorize things they don't have. I think that's the latest thing the Copyright Board said about that.

Mr. Barry Sookman: Mr. Graham, would you mind if I just said for 20 seconds what I—

Mr. David de Burgh Graham: That's all I have, so take it.

Mr. Barry Sookman: Okay.

It's neither here nor there whether any particular author is or is not within a repertoire. What's really important for this committee is why Access Copyright is not being paid after tariffs are certified by the board, and what this committee can recommend to address that problem.

Mr. Steven Seiferling: Can I respond to that?

The Chair: Thank you.

Mr. David de Burgh Graham: Apparently not.

The Chair: Now, for the final two minutes, it's all yours, Mr. Masse.

Mr. Brian Masse: Thank you, Mr. Chair. It's been exciting.

One of the things I would like to follow up on, Mr. Katz, is with regard to the artists being at the centre, as you mentioned. What's your interpretation right now in terms of the remuneration they're getting? There's a lot of money being made with regard to copyright. Control seems to have been ceded by many artists as it goes to YouTube and other types of sharing platforms. It's a debate in terms of where you have control and where you don't, and whether you get overexposed or underexposed.

I'd like to reinforce what I think is an interesting point you made about the artists and creators being at the centre of the law. Can you complete that, please?

Mr. Ariel Katz: I think Mr. Azzaria made the point.

Mr. Brian Masse: Oh, I'm sorry. I'm mistaken.

Mr. Azzaria, go ahead, please.

Mr. Georges Azzaria: What was your question?

Mr. Brian Masse: There seems to be an incredible amount of wealth being generated here. You made the comment about artists and creators being at the centre of that. What disconnect do you think is taking place? That's the whole point of copyright. It was to protect some of that to start with. Where do you think some of this wealth is going?

Mr. Georges Azzaria: I think there are a lot of studies showing that the authors are not being paid. I think it's quite obvious. As for who is getting the money, it's the Internet providers, the big ones like Google, Facebook, etc. The money is going there. That's the problem. They're making a lot of money. The people who produce the content are not making that money. The value gap is all about that. That's a serious problem.

From a policy point of view, I think it's quite cynical to say, well, the creators will create anyway so we don't have to give them too many rights; they love to create, so just let them write books and do art. That's okay. They'll do it anyway because it's their passion.

I think we have to say, from a policy point of view, that we have to protect them and give them some rights, especially in the case where the money is there. A study in Quebec that was issued a few weeks ago said that people pay more for services than they do for content. The money is there, you know.

Mr. Brian Masse: Thank you, Mr. Chair.

The Chair: Thank you very much to all of our guests for coming today. We had some lively moments. It was exciting.

We're going to suspend for a quick two minutes. You can say your goodbyes, and we'll come back in camera and deal with some housekeeping.

Thank you very much.

[*Proceedings continue in camera*]