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Chair

Mr. Dan Ruimy

Standing Committee on Industry, Science and Technology

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● (1530)

[*English*]

The Chair (Mr. Dan Ruimy (Pitt Meadows—Maple Ridge, Lib.)): Welcome, everybody.

Can you feel the excitement in the air? I'm not talking about Christmas. We should all be excited now. This is the second-to-last witness panel on copyright—

Mr. Brian Masse (Windsor West, NDP): That you know of.

Voices: Oh, oh!

The Chair: Don't do that.

Mr. Brian Masse: I've been here for a while.

The Chair: Welcome, everybody, to the Standing Committee on Industry, Science and Technology, meeting 143, as we continue our five-year statutory review of copyright.

Today we have with us Casey Chisick, a partner with Cassels Brock & Blackwell LLP; Michael Geist, Canada research chair in Internet and e-commerce law, faculty of law, University of Ottawa; Ysolde Gendreau, a full professor, faculty of law, Université de Montréal; and then, from the Intellectual Property Institute of Canada, we have Bob Tarantino, chair, copyright policy committee and Catherine Lovrics, vice-chair, copyright policy committee.

You'll each have up to seven minutes for your presentation, and I will cut you off after seven minutes because I'm like that. Then, we'll go into questions because I'm sure we have lots of questions for you.

We're going to get started with Mr. Chisick.

I want to thank you. You were here once before, and you didn't get a chance to do your thing, so thank you for coming from Toronto to see us again.

Mr. Casey Chisick (Partner, Cassels Brock & Blackwell LLP, As an Individual): I'm happy to be here. Thank you for inviting me back.

My name is Casey Chisick. I'm a partner at Cassels Brock in Toronto. I'm certified as a specialist in copyright law and I've been practising and teaching in that area for almost 20 years. That includes many appearances before the Copyright Board and in judicial reviews of decisions of the board, including five appeals to the Supreme Court of Canada.

In my practice, I act for a wide variety of clients, including artists, copyright collectives, music publishers, universities, film and TV producers, video game developers, broadcasters, over-the-top services and many others, but the views I express here today will be mine alone.

I want to begin by thanking and congratulating the committee for its dedication to this important task. You've heard from many different stakeholders over the course of many months, and I agree with many of their views. When I was first invited to appear last month, I planned to focus on Copyright Board reform, but that train has now left the station through Bill C-86, so I'm going to comment today a bit more broadly on other aspects of the act. I will come back to the board, though, toward the end of my remarks.

On substantive matters, I'd like to touch on five specific issues.

First, it's my view that Parliament should clarify some of the many new and expanded exceptions from copyright infringement that were introduced in the 2012 amendments. Some of those have caused confusion and have led to unnecessary litigation and unintended consequences.

For example, a 2016 decision of the Copyright Board found that backup copies of music made by commercial radio stations accounted for more than 22% of the commercial value of all of the copies that radio stations make. As a result of the expansion of the backup copies exception, the Copyright Board then proceeded to discount the stations' royalty payments by an equivalent percentage of over 22%. It took that money directly out of the pockets of creators and rights holders, even though the copies were found in that case to have very significant economic value.

In my view, that can't be the kind of balance that Parliament intended when it introduced that exception in 2012.

Second, the act should be amended to ensure that statutory safe harbours for Internet intermediaries work as intended. They need to be available only to truly passive entities, not to sites or services that play more active roles in facilitating access to infringing content. I agree that intermediaries who do nothing more than offer the means of communication or storage should not be liable for copyright infringement, but too many services that are not passive, including certain cloud services and content aggregators, are resisting payment by claiming that they fall within the same exceptions. To the extent that it's a loophole in the act, it should be closed.

Third, it's important to clarify ownership of copyright in movies and television shows, mostly because the term of copyright in those works is so uncertain under the current approach, but I disagree with the suggestion that screenwriters or directors ought to be recognized as the authors. I haven't heard any persuasive explanation from their representatives as to why that should be the case or, more importantly, what they would do with the rights they're seeking if those rights were to be granted.

In my view, given the commercial realities of the industry, which has dealt with this for years under collective agreements, a better solution would be to deem the producer to be the author, or at least the first owner of copyright, and deal with the term of copyright accordingly.

Fourth, Parliament should reconsider the reversion provisions of the Copyright Act. Currently, assignments and exclusive licences terminate automatically 25 years after an author's death, with copyright then reverting to the author's estate. That was once standard in many countries, but it's now more or less unique to Canada, and it can be quite disruptive in practice.

Imagine spending millions of dollars turning a book into a movie or building a business around a logo commissioned from a graphic designer only to wake up one day and find that you no longer have the right to use that underlying material in Canada. There are better and more effective ways to protect the interests of creators, many of whom I represent, without turning legitimate businesses upside down overnight.

● (1535)

Fifth, the act should provide a clear and efficient path to site blocking and website de-indexing orders on a no-fault basis to Internet intermediaries and with an appropriate eye on balance among the competing interests of the various stakeholders. Although the Supreme Court has made clear that these injunctions may be available under equitable principles, the path to obtaining them is, in my view, far too long and expensive to be helpful to most rights holders. Canada should follow the lead of many of its major trading partners, including the U.K. and Australia, by adopting a more streamlined process—one that keeps a careful eye on the balance of competing interests among the various stakeholders.

In my remaining time, I'd like to address the recent initiatives to reform the operations of the Copyright Board.

The board is vital to the creative economy. Rights holders, users and the general public all rely on it to set fair and equitable rates for the uses of protected material. For the Canadian creative market to function effectively, the board needs to do its work and render its decisions in a timely, efficient and predictable way.

I was glad to see the comprehensive reforms in Bill C-86. I'm also mindful that the bill is well on its way to becoming law, so what I say here today may not have much immediate impact. For that reason, and in the interest of time, I'll just refer you to the testimony I gave before the Senate banking committee on November 21. I'll then touch on two specific issues.

First, the introduction of mandatory rate-setting criteria, including both the public interest and what a willing buyer would pay to a willing seller, is a very positive development. Clear and explicit criteria should result in a more timely, efficient and predictable tariff process. That's important because unpredictable rates can lead to severe market disruption, especially in emerging markets, like online music.

I'm concerned that the benefits of the provision in Bill C-86 will be undermined by its language, which also empowers the board to consider “any other criterion” it deems appropriate. An open-ended approach like this will create more mandatory boxes for the parties to check, in addition to things like technological neutrality and balance, which the Supreme Court introduced in 2015, but it won't guarantee that the board won't simply discard the parties' evidence in favour of other, totally unpredictable factors. That could increase the cost of board proceedings, with no corresponding increase in efficiency or predictability.

If it's too late to delete that provision from Bill C-86, I suggest that the government move quickly to provide regulatory guidance as to how the criteria should be applied, including what to look for in the willing buyer, willing seller analysis.

Last, very briefly, I understand that some committee witnesses have suggested that rather than doing it voluntarily, as the act currently provides, collectives should be required to file their licensing agreements with the Copyright Board. I agree that having access to all relevant agreements could help the board develop a more complete portrait of the markets it regulates. That's a laudable goal.

However, there's also an important counterweight to consider: Users may be reluctant to enter into agreements with collectives if they know they're going to be filed with the Copyright Board and thus become a matter of public record. The concern would be, of course, that services in the marketplace are operating in a very competitive environment. The last thing they want to do is make the terms of their confidential agreements known to everyone, including their competitors. I can say more about this in the question and answer session to follow.

Thank you for your attention. I do look forward to your questions.

● (1540)

The Chair: Thank you very much.

We're going to move to Michael Geist.

You have seven minutes, please, sir.

Dr. Michael Geist (Canada Research Chair in Internet and E-Commerce Law, Faculty of Law, University of Ottawa, As an Individual): Thank you.

Good afternoon. My name is Michael Geist. I am a law professor at the University of Ottawa, where I hold the Canada research chair in Internet and e-commerce law and where I am a member of the Centre for Law, Technology and Society. I appear today in a personal capacity as an independent academic, representing only my own views.

I have been closely following the committee's work, and I have much to say about copyright reform in Canada. Given the limited time, however, I'd like to quickly highlight five issues: educational copying, site blocking, the so-called value gap, the impact of the copyright provisions in the CUSMA, and potential reforms in support of Canada's innovation strategy. My written submission to the committee includes links to dozens of articles I have written on these issues.

First, on educational copying, notwithstanding the oft-heard claim that the 2012 reforms are to blame for current educational practices, the reality is that the current situation has little to do with the inclusion of education as a fair dealing purpose. You need not take my word for it. Access Copyright was asked in 2016 by the Copyright Board to describe the impact of the legal change. It told the board that the legal reform did not change the effect of the law. Rather, it said, it merely codified existing law as interpreted by the Supreme Court.

Further, the claim of 600 million uncompensated copies that lies at the heart of allegations of unfair copying is the result of outdated guesswork using decades-old data and deeply suspect assumptions. The majority of the 600 million, or 380 million, involves kindergarten to grade 12 copying data that goes back to 2005. The Copyright Board warned years ago that the survey data was so old it may not be representative. The remaining 220 million comes from a York University study, much of which is as old as the K-to-12 data. Regardless of its age, however, extrapolating some old copying data from a single university to the entire country does not provide a credible estimate.

In fact, this committee has received copious data on the state of educational copying, and I would argue that it is unequivocal. The days of printed course packs have largely disappeared in favour of digital access. As universities and colleges shift to digital course management systems, the content used changes too. An Access Copyright study at Canadian colleges found that books comprised only 35% of the materials. Moreover, the amount of copying that occurs within these course management systems is far lower than exists with print.

Perhaps most importantly, CMS allows for the incorporation of licensed e-books, open access materials and hyperlinks to other content. At the University of Ottawa, there are now 1.4 million licensed e-books, many of which involve perpetual licences that require no further payment and can be used for course instruction. Further, governments have invested tens of millions in open educational resources, and educational institutions still spend millions annually on transactional pay-per-use licences even where those schools have a collective licence.

What this means is that the shift away from the Access Copyright licence is not grounded in fair dealing. Rather, it reflects the adoption of licences that provide both access and reproduction rights. These licences provide universities with access to content and the ability to use it in their courses. The Access Copyright licence offers far less, granting only copying rights for previously acquired materials. Therefore, efforts to force the Access Copyright licence on educational institutions by either restricting fair dealing or implementing statutory damages reform should be rejected. The prospect of restricting fair dealing would represent an anti-innovation and anti-education step backwards, and run counter to the experience of the past six years of increased licensing, innovation and choice for both authors and educational users.

With respect to statutory damages, supporters argue that a massive escalation in potential statutory damage awards is needed for deterrence and to promote settlement negotiations, but there is nothing to deter. Educational institutions are investing in licensing in record amounts. Promoting settlement negotiations amounts to little more than increasing the legal risks for students and educational institutions.

Second, on site blocking, the committee has heard from several witnesses who have called for the inclusion of an explicit site-blocking provision in the Copyright Act. I believe this would be a mistake. First, the CRTC proceeding into site blocking earlier this year led to thousands of submissions that identified serious problems with the practice, including from the UN special rapporteur for freedom of expression, who raised freedom of expression concerns, and technical groups who cited risks of over-blocking and net neutrality violations. Second, even if there is support for site blocking, the reality is that it already exists under the law, as we saw with the Google v. Equustek case at the Supreme Court.

Third, on the value gap, two issues are not in dispute here. First, the music industry is garnering record revenues from Internet streaming. Second, subscription streaming services pay more to creators than ad-based ones. The question for the copyright review is whether Canadian copyright law has anything to do with this. The answer is no.

● (1545)

The notion of a value gap is premised on some platforms or services taking advantage of the law to negotiate lower rates. Those rules, such as notice and take down, do not exist under Canadian copyright laws. The committee talked about this in the last meeting. That helps explain why industry demands to this committee focus instead on taxpayer handouts, such as new taxes on iPhones. I believe these demands should be rejected.

Fourth is the impact of the new CUSMA. The copyright provisions in this new trade agreement significantly alter the copyright balance by extending the term of copyright by an additional 20 years, a reform that Canada rightly long resisted. By doing so, the agreement represents a major windfall that could result in hundreds of millions for rights holders and creates the need to recalibrate Canadian copyright law to restore the balance.

Finally, there are important reforms that would help advance Canada's innovation strategy, for example, greater fair dealing flexibility. The so-called “such as” approach would make the current list of fair dealing purposes illustrative rather than exhaustive and would place Canadian innovators on a level playing field with fair use countries such as the U.S. That reform would still maintain the full fairness analysis, along with the existing jurisprudence, to minimize uncertainty. In the alternative, an exception for informational analysis or text and data mining is desperately needed by the AI sector.

Canada should also establish new exceptions for our digital lock rules, which are among the most restrictive in the world. Canadian businesses are at a disadvantage relative to the U.S., including the agriculture sector, where Canadian farmers do not have the same rights as those found in the United States.

Moreover, given this government's support for open government —including its recent funding of Creative Commons licensed local news and its support for open source software—I believe the committee should recommend addressing an open government copyright barrier by removing the Crown copyright provision from the Copyright Act.

I look forward to your questions.

The Chair: Thank you very much. Your timing was really good.

[*Translation*]

Ms. Gendreau, you have seven minutes.

Prof. Ysolde Gendreau (Full Professor, Faculty of Law, Université de Montréal, As an Individual): Mr. Chair, ladies and gentlemen, thank you for agreeing to hear me.

My name is Ysolde Gendreau, and I am a full professor at the Université de Montréal's Faculty of Law.

Since my master's studies, I have specialized in copyright law—I am the first in Canada to have completed a doctorate in this field. With few exceptions, my publications have always focused on this area of law. I am appearing here in a purely personal capacity.

I would like to read an excerpt from the discussions at the Revision Conference of the Bern Convention in Rome in 1928 on the right to broadcasting, recognized in article 11*bis*.

Comments on that text state:

> In the first paragraph, the article... strongly confirms the author's right; in the second, it leaves it to national laws to regulate the conditions under which the right in question may be exercised, while acknowledging that, in recognition of the general public interest of the State, limitations to copyright may be put in force; however it is understood that a country shall only make use of the possibility of introducing such limitations where their necessity has been established by the experience of that country itself; such limitations shall not in any case lessen the moral right of the author; nor shall they affect the author’s right to equitable remuneration, which shall be fixed, failing agreement, by the competent authorities.

The principle of the 1928 article remains today.

Were the economic players who benefited from the broadcasting of works, that is, the broadcasters, and who had liability imposed on them at the time happy with it? Of course not. Today, the economic players who benefit from the distribution of works on the Internet continue to resist the imposition of copyright liability.

We don't have to wait 90 years to reach the consensus that exists in the broadcasting world. Just 20 years later, in 1948, no one batted an eyelid to see broadcasters pay for the works they use. In the future, the resistance of today's digital communications industry will be considered just as senseless as that of broadcasters 90 years ago if we act.

● (1550)

[*English*]

I would now like to turn your attention to enforcement issues with respect to the Internet. Because it is tied to the right to communicate, the making available right has become part of the general regime that governs this right to communicate. Additional provisions have, however, generated antinomies that sap the new right of the very consequences of its recognition. Here are examples, which I do not expect you to read as I refer to them, but that I am showing to you now because I'll refer to them generally later on.

The general ISP liability requires the actual infringement of a work in order to engage the liability of a service provider. This condition is reinforced by a provision on statutory damages. The hosting provision also requires an actual infringement of a work, this time recognized by a court decision in order to engage the liability of a hosting provider. Our famous UGC exception is very much premised on the use of a single work or very few works by a single individual for whom the copyright owner will be claiming that the exception does not apply. Within the statutory damages provisions, several subsections seriously limit the interest of a copyright owner to avail himself of this mechanism. One of them even impacts other copyright owners who would have a similar right of action. Of course, our notice and notice provisions are again premised on the issuance of a notice to a single infringer by one copyright owner.

The functional objectives of these provisions are completely at odds with the actual environment in which they are meant to operate. Faced with mass uses of works, collective management started in the 19th century precisely because winning a case against a single user was perceived as a *coup d'épée dans l'eau*. The Internet corresponds to a much wider phenomenon of mass use, yet our Copyright Act has retreated to the individual enforcement model. This statutory approach is totally illogical and severely undermines the credibility of any copyright policy aimed at the Internet phenomenon.

As you may have seen, the texts I refer to are fairly wordy, and many are based on conditions that are stacked against copyright owners. Just imagine how long it may take to get a judgment before using section 31.1, or how difficult it is for a copyright owner to claim that the dissemination of a new work actually has "a substantial adverse effect, financial or otherwise, on the exploitation or potential exploitation" of the work". These provisions rely on unrealistic conditions that can only lead to abuses by their beneficiaries.

The direction that our Copyright Act has taken in 2012 goes against the very object that it was supposed to harness. The response to mass uses can only be mass management—that is, collective management—in a manner that must match the breadth of the phenomenon. The demise of the private copying regime in the 2012 amendments, by the deliberate decision not to modernize it, was in line with this misguided approach of individual enforcement of copyright on the Internet.

● (1555)

[*Translation*]

Given the time available, I'm not able to raise the points that should logically accompany these comments, but you may want to use the period for questions to get more details. I would be pleased to provide you with that information.

Thank you for your attention.

The Chair: Thank you very much.

[*English*]

We're going to move to, finally, the Intellectual Property Institute of Canada.

Mr. Tarantino.

Mr. Bob Tarantino (Chair, Copyright Policy Committee, Intellectual Property Institute of Canada): Thank you, Mr. Chair.

My name is Bob Tarantino. I'm here with Catherine Lovrics. We are here in our capacities as former chair and current chair, respectively, of the Intellectual Property Institute of Canada's copyright policy committee. We are speaking in those capacities and not on behalf of the law firms with which we are associated, or on behalf of any of our respective clients.

We'd like to thank you for inviting IPIC to present to you our committee's recommendations with respect to a statutory review of the act.

IPIC is the Canadian professional association of patent agents, trademark agents and lawyers practising in intellectual property law. IPIC represents the views of Canadian IP professionals, and in our submissions to the committee we strove to represent the diversity of views among copyright law practitioners in as balanced a manner as possible.

You have our committee's written submissions, so in this speech I will be highlighting only a few of the recommendations contained therein. That being said, I'd like to provide a framing device for our comments, which I think is important for this committee to bear in mind as it deliberates, and that is the need for evidence-based policy-making. The preamble to the 2012 Copyright Modernization Act described one of the purposes of its amendments as promoting "culture and innovation, competition and investment in the Canadian economy".

However, the extent to which any of those desired goals have been achieved because of changes to the act in 2012 remains unknown. There is little to no publicly available empirical data about the effects of copyright reform. We recommend that work commence now in anticipation of the next mandated review of the act to ensure that copyright reform proceeds in a manner informed by rigorous, transparent and valid data about the results, if any, which copyright reform has already achieved. Parliament should identify what would constitute success in copyright reform, mandate funding to enable the collection of data that speak to those identified criteria for success and ensure that the data is publicly accessible.

As noted in our written submission, we think some easy and granular fixes can be made to the act that will facilitate copyright transactions. Those changes include allowing for the assignment of copyright in future works and clarifying the rights of joint owners. The remainder of my comments will highlight four bigger picture recommendations, each of which should be implemented in a way that respects the rights and interests of copyright authors, owners, intermediaries, users and the broader public.

On data and databases, it is now trite to say that increasing commercial value is attributed to data and databases. However, the current legal basis for according copyright protection to them remains uncertain. Consideration should be given to amendments that effect a balance between the significant investments made in creating databases and avoiding inadvertently creating monopolies on the individual facts contained within those databases or deterring competition in fact-driven marketplaces. One approach to this issue that we flag for your attention is the European Union's *sui generis* form of protection for databases.

Regarding artificial intelligence and data mining, continuing with the theme of uncertainty, the interface between copyright and artificial intelligence remains murky. The development of machine learning and natural language processing often relies on large amounts of data to train AI systems, the process referred to as data mining. Those techniques generally require copying copyright-protected works, and can also require access to large datasets that may be protected by copyright.

We recommend that the committee consider text and data access and mining requirements in the context of AI. In particular, we refer you to amendments enacted in the United Kingdom that permit copying for the purposes of computational analysis.

Relatedly, whether works created using AI are accorded copyright protection is ambiguous, given copyright's originality requirement and the need for human authorship. A possible solution is providing copyright protection to works created without a human author in certain circumstances. Again, we refer you to provisions contained in the copyright legislation of the United Kingdom and to the approach the Canadian Copyright Act takes in respect to makers of sound recordings.

One the $1.25-million tariff exemption for radio broadcasters, the first $1.25 million of advertising revenue earned by commercial broadcasters is exempt from Copyright Board-approved tariffs in respect of performer's performances and sound recordings, other than a nominal $100 payment. In other words, of the first $1.25 million of advertising revenue earned by a commercial broadcaster, only $100 is paid to performers and sound recording owners. By contrast, songwriters and music publishers collect payments from every dollar earned by the broadcaster. The exemption is an unnecessary subsidy for broadcasters at the expense of performers and sound recording owners and should be removed.

Regarding injunctive relief against intermediaries, Internet intermediaries that facilitate access to infringing materials are best placed to reduce the harm caused by unauthorized online distribution of copyright-protected works. This principle is reflected in the EU copyright directive and has provided the foundation for copyright owners to obtain injunctive relief against intermediaries whose services are used to infringe copyright. The act should be amended to expressly allow copyright owners to obtain injunctions such as site blocking and de-indexing orders against intermediaries.

● (1600)

The act should be amended to expressly allow copyright owners to obtain injunctions such as site blocking and de-indexing orders against intermediaries. This recommendation is supported by a broad range of Canadian stakeholders, including ISPs. Moreover, more than a decade of experience in over 40 countries demonstrates that site blocking is a significant, proven and effective tool to help reduce access to infringing online materials.

I'd like to thank you again for inviting IPIC to present you with our comments today.

We're happy to answer any questions you may have about our submission.

The Chair: Thank you very much.

We're going to jump right into questions, starting with Mr. David Graham.

You have seven minutes, sir.

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

I have enough questions to go around. It might be a bit of a game of whack-a-mole here.

We talked a bit about the need to go to basically collective enforcement rather than individual enforcement of copyright because it's no longer manageable. How can collective copyright enforcement work without just empowering larger users and owners to trample on users and small producers?

Prof. Ysolde Gendreau: The difficulty I see behind your question is that people tend to see the collective administration of copyright as a big business issue. People tend to forget that behind the CMOs, collective management organizations, or the collectives, there are actual individuals. The collective management of rights for these people is actually the only solution for them to make sure that they receive some sort of remuneration in this kind of mass environment, and indeed they require getting together in order to fight off GAFA. This is the elephant in the room. We know that so much money is being siphoned off the country because not enough people who are involved in the business of making all these works available to the public are paying their fair share of this kind of material.

This kind of management is possible. There are enough safeguards in the act, and even in the Competition Act, to ensure that this is not being abused.

Mr. David de Burgh Graham: Talking about abuse, we certainly see the abuse. Google and Facebook were here a couple of weeks ago. They admitted they only look at larger copyright holders when they're doing their enforcement systems. They admit they don't care about Canadian exemptions under fair dealing. The abuse is already there.

I don't see how removing protections for individuals is going to improve that.

Prof. Ysolde Gendreau: I'm not saying that we should remove protections from individuals. I'm just saying that when all is looked at globally, everybody should be paying a fair share for the use of the works. I have trouble imagining that people who are willing to pay $500 and more for an iPhone would find it damaging to pay an extra.... I certainly don't want to be bound by whatever number we may imagine. We'd say that this is going to prevent them from having free expression or from having access to the work. Even if, on the price of an iPhone or other equipment, extra money were not added, given the profit margin on these products, this is something that will certainly not put these companies into bankruptcy.

I see the advent of a better functioning collective management system as something that actually protects the individuals.

Mr. David de Burgh Graham: I don't have a lot of time so I'll move on.

Mr. Geist, I mentioned Facebook and Google's testimony a minute ago where they identified that they don't make any effort to enforce fair dealing. You are familiar with that. Do you have any comments or thoughts on that from your sense or background?

Dr. Michael Geist: Yes, it's been a significant source of frustration. In fact, I had a personal experience with my daughter, who created a video after she participated in a program called March of the Living, where she went to concentration camps in Europe and then on to Israel. As part of the Ottawa community, she interviewed all the various participants who were alongside her, created a video that was going to be displayed here to 500 people. There was some background music along with the interviews. They posted it to YouTube, and on the day this was to be shown the sound was entirely muted because the content ID system had identified this particular soundtrack.

They were able to fix that, but if that isn't a classic example of what non-commercial, user-generated content is supposed to protect, I'm not sure what is. The fact that Google hasn't tried to ensure that the UGC provision that Professor Gendreau mentioned, which, as this example illustrates, has tremendous freedom of expression potential for lots of Canadians, is for me not just disappointing but a real problem.

● (1605)

Mr. David de Burgh Graham: Mr. Chisick, I have a question for you too.

You talked about 22% of the value for broadcasters' backup copies. If they're actual backup copies, where is the problem?

Mr. Casey Chisick: The problem is this. The Copyright Board conducted an overall valuation of all of the copies used by radio broadcasters. It determined that if it were forced to allocate value among the different types of copies, some value would go to backup copies, some value would go to main automation system copies and so on and so forth, until you get to 100%.

The Copyright Board found that 22% of that value was allocable to backup copies. In other words, radio stations derive commercial value from the copies they make and 22% of that is allocable to backup copies. There is therefore significant commercial value to those backup copies, yet the Copyright Board felt compelled, under the expanded backup copies exception, to remove that value from the royalties that are paid to rights holders.

Now, if that was a correct interpretation of the backup copies exception, then the Copyright Board may have had no choice but to do what it did. My point is simply that the intention of these exceptions must not be to exempt large commercial interests from paying royalties for copies from which they themselves derive significant commercial value. That's an example to me of a system of exemptions that's out of whack in the grand scheme of balance between the interests of rights holders, users and the public interest.

Mr. David de Burgh Graham: I have only a half a minute left here, but I'm just trying to understand the issue, because you've brought up this major point about the money that they're not spending on.... If they use the main copy or the backup copy to broadcast something, what's the difference?

Mr. Casey Chisick: I'm sorry. I didn't understand your question.

Mr. David de Burgh Graham: We've always had the right to format shifting. If I buy something that I convert to the computer and I broadcast it, that's the backup copy, and if you add a monetary value.... This all doesn't connect very well to me.

Mr. Casey Chisick: I understand the question.

This requires a review of 20 years of Copyright Board radio broadcasting tariffs, which obviously we don't have time for here, but the point of the matter is that, until 2016, radio broadcasters paid a certain amount for all of the copies they made. It was only in 2016, after the 2012 amendments had come into force, that the Copyright Board felt that it had to go through the exercise of slicing and dicing those copies and determining what value was allocable to which. It was then that the 22% exemption was instituted.

Your point is a valid one, because nothing had changed. The approach that radio stations take to copying music hadn't changed. The value that they derived from the copies hadn't changed. The only thing that had changed was the introduction of an exception that the Copyright Board believed needed to lead inexorably to a royalty reduction.

That's what I am reacting to, and that's what I'm suggesting to the committee ought to be re-examined.

Mr. David de Burgh Graham: My time is up. Thanks.

The Chair: Thank you very much.

Mr. Albas, you have seven minutes.

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

I'd like to thank all of our witnesses for their testimony here today.

In recent weeks we've been hearing from various witnesses favouring a change in approach in how we do copyright and moving to a more American-style fair use model. I would like to survey the group here.

What are the benefits of looking at American-style fair use? What should we take from that and what should we be very wary of?

That's for any of the panellists.

Dr. Michael Geist: I'll start by reiterating why I think it's a good idea, although I would argue not to jump in with the U.S. fair use provision but rather to use, as I mentioned, the “such as” approach and turn the current fair dealing purposes into a group of illustrative purposes rather than an exhaustive list.

I think that both provides the benefits of being able to rely on our existing jurisprudence, as it represents an evolution of where we're at rather than starting from scratch, and makes it a far more technologically neutral approach. Rather than every five years having people coming up and saying that you need to deal with AI or with some other new issue that pops up, that kind of provision has the ability to adapt as time goes by. We're seeing many countries move in that direction.

I would lastly note that in what's critical as part of this, whether you call it fair dealing or fair use, what's important is whether or not it's fair. The analysis about whether or not it is fair remains unchanged, whether it's an illustrative group or an exhaustive group. That's what matters: to take a look at what's being copied and assess whether it's fair. The purpose is really just a very small part of that overall puzzle, yet by limiting the list we then lock ourselves into a particular point in time and aren't able to adapt as easily as technology changes.

● (1610)

Mr. Casey Chisick: If I may, I agree with Professor Geist that the most important aspect of the fair dealing analysis by far is fairness, but there's a reason that Canada is one of the vast majority of countries in the world that does maintain a fair dealing system. There are really only, last I checked, three or four jurisdictions in the world —the U.S., obviously, Israel and the Philippines—that have a fair use system.

Most of the world subscribes to fair dealing, and there is a reason why. The reason is that governments want to reserve for themselves the ability from time to time to assess what sorts of views in the grand scheme of things are eligible for a fair dealing type of exception, and if we just simply throw the categories open to everything such as X, Y and Z, the predictability of that system becomes far less, and it becomes far more difficult for stakeholders and the copyright system to order their affairs. It becomes more difficult to know what will be considered fair dealing or what's eligible to be considered fair dealing and to plan accordingly.

Overall, Canada has exhibited a fair sensitivity to these issues. The fair dealing categories, obviously, were expanded in 2012 and may well be expanded again in the future when the government sees fit, but I think that to expand it to the entire realm of potential dealings runs the risk of going too far.

Prof. Ysolde Gendreau: I am against the idea of having a fair use exception for several reasons.

First of all, I think that in reality what we have already is very close to the U.S. system. We have purposes that are extremely similar to the fair use purposes. We have criteria that are paraphrases of the fair use criteria, and I really don't think that there is that much of a difference in terms of what the situation is doing. What is happening, though, is that, for the examples we have, it's not just "such as". I see a very dangerous slope. "Such as" does not mean anything that is fair. "Such as" should mean that we keep within the range of what is already enumerated as possible topics, which is what we already have with our fair dealing exception.

Second, many of these fair use exceptions in the United States have led to results that are extremely difficult to reconcile with a fair use system. They are very criticized, and lastly, I would say that, in order for a fair use system to work in the magnitude that people would want it to work, you would need an extremely litigious society. We are about a 10th of the size of the U.S. We don't have the same kind of court litigation attitude as in the U.S., and I think that this is an important factor in order not to create uncertainties.

Thank you.

Mr. Dan Albas: Mr. Chair, I'd like to share the rest of my time with Mr. Lloyd, if that's all right.

The Chair: You have two minutes left.

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

Thank you to our witnesses today.

I have a couple of quick questions for Mr. Chisick. I wish all of you had been here earlier in the study. You could have helped us frame the debate a little more clearly.

One of your points was about closing the loophole about intermediaries. Could you expand on that and give us some real-life examples to help illustrate what you mean?

Mr. Casey Chisick: Obviously, as a lawyer in private practice, I have to be careful about the examples I give, because many of them come from the real lives of my clients and the companies they deal with from day to day.

What I can tell you is that it has been my experience that certain services—and I gave a couple of examples, both services that are engaged in cloud storage with a twist, helping users to organize their cloud lockers in a way that facilitates quicker access to various types of content and potentially by others than just the locker owner, as well as services that basically operate as content aggregators by a different name—are very quick to try to rely on the hosting exception or the ISP exception, the communications exception, as currently worded to say, "Sure, somebody else might have to pay royalties, but we don't have to pay royalties because our use is exempt. So if it's all the same to you, we just won't".

● (1615)

Mr. Dane Lloyd: They're going further than just being a dumb pipe. They're facilitating.

Mr. Casey Chisick: They are. That's right. They are, so my view is that the exception needs to be adjusted, not repealed but adjusted, to make very clear that any service that plays an active role in the communication of works or other subject matter that other people store within the digital memory doesn't qualify for the exception.

Mr. Dane Lloyd: I will come back to you because I do have another question.

Mr. Casey Chisick: Okay.

Mr. Dane Lloyd: I just wanted to get a quick question to Mr. Geist.

Am I out? Okay. Never mind.

The Chair: Sorry, but I'm glad you knew those terms that you were using.

We're going to move to Mr. Masse.

You have seven minutes.

Mr. Brian Masse: Thank you.

The USMCA changes things in a couple of parameters. How does it change your presentations here?

I was just in Washington and there's no clear path for this to get passed. We could be back to the original NAFTA, and if that goes away then we're back to the original free trade, but that requires Trump to do a six-month exit and notification, and there's debate about whether or not that's on the presidential side or whether it's Congress and there will be lawyers involved and so forth. We're at a point now where we have a potential deal in place. Vegas is making the odds about whether it's going to pass or not.

Maybe we can go around the table here in terms of how you think it affects your presentations here and our review. We're going to have to report back with it basically being...and there are many with the opinion that Congress won't accept it because they don't have enough concessions from Canada.

I put that out there because it's something that changed during the process of our discussions from the beginning of this study to where we are right now, and again where we'll have to give advice to the minister.

We can start on the left side here and move to the right.

Ms. Catherine Lovrics (Vice-Chair, Copyright Policy Committee, Intellectual Property Institute of Canada): Among our committee there was no consensus with respect to term extension, so it wouldn't have been an issue that we addressed as part of our submission.

But as a result of term extension clearly being covered in USMCA we touched upon reversionary rights, because I think if copyright term is extended it's incumbent upon the government to also consider reversionary rights within that context. This is because at present you are effectively adding those 20 years if the first owner of copyright would have been the author and the author had assigned rights, and reversionary rights under the current regime with everything except for collective works, you would be extending copyright for those who have the reversionary interest and not for the current copyright owners. That was the way that IPIC submissions were impacted.

Mr. Brian Masse: You're pretty well split within an organization about the benefits and detractions from—

Ms. Catherine Lovrics: For term extension, I think it's a very contentious issue and there was no consensus among our committee.

Mr. Brian Masse: Would it be fair to say, though, it has significant consequences for opinions on both sides? It's not a minor thing. It's a significant one.

Ms. Catherine Lovrics: I think most definitely. I think there are both very strong advocates for term extension who look to international rights as being one justification for the reason to extend term, and I think there are those who view extending the term as limiting the public domain in Canada in a way that's not appropriate. Again, there's no consensus.

With USMCA proposing it, reversionary rights should be looked at.

Mr. Brian Masse: Thank you.

Mr. Chisick.

Mr. Casey Chisick: I would agree with that. I mentioned reversionary rights in my presentation, and I don't want to be understood as necessarily suggesting that the way to deal with reversionary rights is to eliminate reversion from the copyright altogether. That's one possible solution, maybe a good solution. There are also other solutions, and certainly with the extension of the term of copyright, which I do think is a good idea, and I've been on the record saying that for some time, how you deal with copyright over that extended term is certainly an issue.

My main point, and it remains regardless of whether the term is life plus 50 or life plus 70, is where reversion is concerned we need to look at it in a way that's less disruptive to the commercial exploitation of copyright. I think the point remains either way.

● (1620)

Mr. Brian Masse: If it was not to be extended, would that change your position on other matters or is it isolated to basically the 50 and 70?

Mr. Casey Chisick: I don't think, sitting here right now—maybe I'll come up with something more intelligent when I'm done—that anything particularly turns on 50 versus 70 in my view.

Mr. Brian Masse: Thank you.

Mr. Geist.

Dr. Michael Geist: I think there were three different types of rules within this agreement related to copyright. There are those provisions that, quite frankly, we already caved on under U.S. pressure back in 2012—

Mr. Brian Masse: Yes.

Dr. Michael Geist: —so our anti-circumvention rules are consistent with the USMCA, but only because there was enormous U.S. pressure leading up to the 2012 reforms, and in fact, we are now more restrictive than the United States, which creates disadvantages for us.

Then there's the one area, the notice-and-notice rules, that the government clearly prioritized and took a stand on to ensure the Canadian rules could continue to exist.

The term extension has an enormous impact, and quite frankly, it's obvious that the government recognized that. It's no coincidence that when we moved from the TPP to the CPTPP, one of the key provisions that was suspended was the term extension. Economist after economist makes it very clear that it doesn't lead to any new creativity. Nobody woke up this morning thinking about writing the great Canadian novel and decided to instead sleep in, because their heirs get 50 years' worth of protection right now rather than 70 years.

For all of the other work that's already been created, that gift of an additional 20 years—quite literally locking down the public domain in Canada for an additional 20 years—comes at an enormous cost, particularly at a time when we move more and more to digital. The ability to use those works in digital ways for dissemination, for education, for new kinds of creativity will now quite literally be lost for a generation.

If there's a recommendation to come out of this committee, it would be, number one, recognize that this is a dramatic shift. When groups come in saying, “Here are all the things we want as rights holders”, they just won the lottery with the USMCA. It's a massive shift in terms of where the balance is at.

Second, the committee ought to recommend that we explore how we can best implement this to limit the damage. It isn't something we wanted. It's something we were forced into. Is there any flexibility in how we ultimately implement this that could lessen some of the harm?

Mr. Brian Masse: Ms. Gendreau.

Prof. Ysolde Gendreau: I'm indifferent to whether it's 50 years or 70 years, for two reasons.

I just finished a book last month that was about literary social life in France in the 19th century. They had salons where people would go, and artists and politicians would mix. In that book there were lists of the artists and the writers who showed up there, and three-quarters of them were names we don't know.

In terms of copyright term protection, I think very few works manage to be relevant 50 years—or even less so—70 years after the death of the author. I don't know why we should be having so much difficulty over an issue that is important for only a minority of authors. That is one reason.

Second, if we are worried about the copyright term, then I think perhaps we should worry about that because of the fact that copyright covers computer programs. Do you realize that because of their nature, there is never a public domain for copyright programs, given the life of copyright programs? This is an industry that's getting absolutely no public domain.

Lastly, I would say it is possible to have a commercial life beyond term, and I think this is right. As to whether that term is 50 or 70 years, as I said, I'm indifferent. I would never walk outside or march for that one way or another, but 70 years is the term that we have for our major G7 partners; therefore, being a member of the G7 comes with a price, and the extra 20 years is a minority issue.

Mr. Brian Masse: We all know the G7 plays with rules.

The Chair: Thank you.

Mr. Brian Masse: Thank you.

That's interesting, though. That question gives the whole spectrum on it.

Thank you very much to the witnesses.

The Chair: That's why we left them to the end.

We're going to jump to Mr. Longfield.

Mr. Lloyd Longfield (Guelph, Lib.): Thanks, Mr. Chair.

I'm going to share a couple of minutes with Mr. Lametti.

I'd like to start with the Intellectual Property Institute of Canada. First of all, thank you for helping us through the study that we had on intellectual property. It was good to see the implementation of some of the ideas we discussed.

I'm thinking of the interaction between the Intellectual Property Institute and the Copyright Board or collectives. How much engagement do you have in terms of guiding artists towards protecting their works, finding the right path forward for them?

I know you do that in other ways with intellectual property, but what about...?

● (1625)

Mr. Bob Tarantino: I'm not sure I'll be able to answer the question with respect to the institutional work that IPIC does, although it maintains relationships, obviously, with those bodies.

As individual advisers, that's a significant part of our day-to-day function, to counsel our clients in terms of how best they can realize the value of the works they've created and exploit those in the marketplace.

Mr. Lloyd Longfield: One of the shortfalls that we found in our previous study was with regard to the transparency—not purposely being non-transparent, but just the fact that people didn't know where to go for solutions or to protect themselves.

Mr. Bob Tarantino: Right. I think one thing that we have to contend with as advisers, and that you have to contend with as legislators, is the fact that the copyright system is incredibly complex. It's incredibly opaque for non-experts. I think a guiding principle that everybody would be on board with would be an effort to make the Copyright Act—and the copyright system, more generally—a little more user-friendly.

There are a number of items that we've canvassed in this discussion already, such as reversionary interest, that add additional complexity to the operation of the act and that, I think, should be assessed with an eye towards making it something that you don't need to engage a lawyer for and pay *x* number of hundreds of dollars an hour in order to navigate.

Mr. Lloyd Longfield: In fact, one of the Google representatives said that it is a “complicated and opaque web of music licensing agreements” that people face.

Now we're just talking about guiding principles. We're very late in the study. When we were working on developing an economic development program for the city of Guelph, we looked at guiding principles. When we looked at our community energy initiative, we looked at guiding principles.

In terms of our act and our study, how can we get some of these guiding principles put up at the front of our study? Do you have other guiding principles that we should look towards?

Mr. Bob Tarantino: I think, broadly speaking, you can identify a handful of guiding principles, drawn from various theoretical approaches, to justify why copyright exists. Among those are providing an incentive for the creation and dissemination of works by ensuring that authors get rewarded. However, I think it's absolutely critical to maintain or to keep in mind that this principle has to be balanced against a broader communal and cultural interest in ensuring the free flow of ideas and cultural expressive activity.

The challenge that you face, of course, is finding a way to calibrate all of the various interests and various mechanisms that you're putting at play here to achieve those quite disparate functions. There's a tension at play there. It's an ongoing tension.

Mr. Lloyd Longfield: Yes.

Mr. Bob Tarantino: I don't think that there is a resolution to it necessarily, but I think that it can be implemented and then assessed on an ongoing basis to identify where there have been shortfalls, overreaches and under-compensation.

Mr. Lloyd Longfield: Thank you.

In the minute that I have left.... Ms. Gendreau, you mentioned the collectives. I am very interested in how collectives are managed or not managed, and the transparency of collectives. Were you leading towards discussing that? If so, maybe you can put that out here.

Prof. Ysolde Gendreau: Yes, I'd be happy to talk about that.

I understand that people may have concerns about the way that collectives are run. I think the fact that some collectives will no longer be obliged to go before the board will perhaps raise even further concerns.

However, I know that there are rules, for instance, in the European Union that look at the internal management of collective societies. I would think that such rules, even though they are probably perceived by collectives as annoying, should actually be embraced precisely because they would give greater legitimacy to their work. I would see such rules as legitimacy enhancers rather than as obstacles to working.

● (1630)

Mr. Lloyd Longfield: Thank you.

Over to you, Mr. Lametti.

Mr. David Lametti: Thank you.

I think my challenge is more that of addressing people by their last names when I've known them for 20 years.

Mr. Tarantino, copying for the purposes of computational analysis is what you potentially suggested as an AI and data mining exception. Do you think that gets us there? Do we need to go with "such as", or—as someone else suggested a couple of weeks ago—do we make an exception for making incidental copies apply to informational analysis? Give me your thoughts on that.

Mr. Bob Tarantino: I'd have to defer to the views of our committee. It's not a point that we specifically canvass them on, beyond what you find in our submission, which is that the U.K. approach is something to consider. What I would suggest is taking it back to our framing device. Let's examine what the result has been in the United Kingdom of implementing their exception for computational analysis.

Mr. David Lametti: Mr. Chisick, do you want to jump in on that?

Mr. Casey Chisick: If what you're referring to is temporary copying for technological processes, exception 30.71, that's a good example of an exception that is framed really broadly in a way that is prone to misunderstanding or abuse.

An example is broadcasters arguing that all of broadcasting, from the ingestion of content until the public performance of the work, is one technological process and, therefore, all copies need to be exempt. It may be that, properly framed, an exception like that is an appropriate mechanism to deal with data mining and artificial intelligence. We have to be very careful to frame these exceptions in such a way that really targets them toward the intended purpose and doesn't leave them prone to exploitation in other senses.

Mr. David Lametti: I'll turn to Mr. Geist, if we have time.

The Chair: Please answer very briefly.

Dr. Michael Geist: As I've mentioned, my preference would be for a broad-based "such as" approach. I do think we need something. Even if we do have it, "such as" should include informational analysis.

I saw the Prime Minister on Friday speaking about the importance of AI. Quite frankly, I don't think the U.K. provision goes far enough. Almost all the data we get comes by way of contract. The ability to, in effect, contract out of an informational analysis exception represents a significant problem. We need to ensure that where you acquire those works, you have the ability.... We're not talking about republishing or commercializing these works. We're talking about using them for informational analysis purposes. You shouldn't have to negotiate those out by way of contract. It should be a policy clearly articulated in the law.

The Chair: Thank you.

Mr. Lloyd, you have seven minutes.

Mr. Dane Lloyd: I'll finish where I started.

The Chair: Actually, you have five minutes. Sorry.

Mr. Dane Lloyd: Okay. That changes everything.

Mr. Geist, there seem to be a lot of negatives to the collective model. If there weren't a collective model, it seems there would need to be a collective model because the transaction costs of an individual artist or writer are so high that they would need to band together. Is there any alternative to the collective model in your academics that you could propose as an idea?

Dr. Michael Geist: The market is providing an alternative right now. I mentioned the 1.4 million licensed e-books that the University of Ottawa has. Those are not acquired through any collective. They're acquired through any number of different publishers or other aggregators. In fact, in many instances we will license the same book on multiple occasions, sometimes in perpetuity, because the rights holder has made it available for this basket of books and for that basket of books and for another basket of books. In fact, authors are doing it all the time, or publishers are doing it all the time right now.

Mr. Dane Lloyd: It does seem very appealing. I like that sort of free market movement idea, but from what we're hearing from the authors who have spoken to us, it doesn't seem.... I'll come back to you.

Mr. Chisick, could you comment on that? Is that a good enough alternative for an author, licensing it through e-books as a replacement for collectives?

Mr. Casey Chisick: From what I'm seeing from authors who are struggling with developments in the market, it may not be a complete solution. There is no question that transactional licensing, particularly in the book publishing area, has made strides over the last decade or so. It doesn't seem to be capturing the full value of all the works that are in use, though. It's something that, arguably, needs to exist alongside a collective licensing model that can pick up the residue.

In other areas of licensing, market-based solutions haven't been effective yet at all—for example, in music, where the entire viability of an author's or an artist's career depends on the ability to collect millions and millions of micro-payments, fractions of pennies.

● (1635)

Mr. Dane Lloyd: What about authors defending their work from copyright infringement? For the average authors, is it within the realm of their financial resources to pursue that litigation without a collective licensing model? Is that something they could do?

Mr. Casey Chisick: No, it isn't. It's almost impossible for all but the most successful artists or frankly, the most successful rights holders, by which I mean publishers and others—the 1% or very close to it—to actually pursue remedies for copyright infringement. Ironically, that's one of the reasons, in the previous round of copyright reform in 1997, that attempts were made through policy to encourage artists and authors to pursue collective management.

Mr. Dane Lloyd: I do want to give Mr. Geist a chance to rebut because it would only be fair, I think.

Dr. Michael Geist: I appreciate that. Thank you.

It's not that I'm saying that no collectives ought to exist. I think there is a role for them. I'm saying that what we have seen, especially in the academic publishing market, is that they have been replaced, in effect, by alternatives. That is the free market at work. Together with some students, I did studies looking at major Canadian publishers, including a number that came before you, and virtually everything they were making available under licence is what our universities have been licensing.

When you get certain authors saying, “I'm getting less from Access Copyright, why is that?”, we need to recognize that a chunk of Access Copyright's revenues go outside the country, a chunk go towards administration, and then a big chunk goes to what they call a payback system, which is for a repertoire. It doesn't have anything to do with use at all. It simply has to do with the repertoire. That repertoire excludes any works that are more than 20 years old and excludes all digital works.

Mr. Dane Lloyd: What about defending people, like Mr. Chisick was talking about? It's outside the realm of 99% of authors to defend themselves, if their works are being infringed in copyright. What's your replacement for that? What's the alternative?

Dr. Michael Geist: In many instances, where those works are being licensed, the publishers do have the wherewithal to take action, if need be. However, the notion that somehow we need collective management, largely to sue educational institutions, strikes me as a bit wrong.

Mr. Dane Lloyd: Well, to protect....

Dr. Michael Geist: With all respect, I don't think anybody is credibly making the case that educational institutions are out there trying to infringe copyright. In fact, we see some educational institutions, even in Quebec, that have a collective management licence with Copibec and are still engaged in additional transactional licences because they need to go ahead and pay them. The bad guys here or the infringers, so to speak, are not the educational institutions.

Mr. Dane Lloyd: Who are they?

Dr. Michael Geist: I'm not convinced that there are major infringers in the area of book publishing.

Mr. Casey Chisick: To be clear, the point that I made about licensing and collective management existing alongside one another is that it's not primarily for the purpose of enforcement. I agree with Professor Geist. The purpose is to make enforcement unnecessary, by making sure that all of the uses that are capable of being licensed and that are appropriate to license are licensed in practice.

Prof. Ysolde Gendreau: May I also add that one aspect that is not often mentioned, I believe, is that with all these new licences that publishers are giving to universities, perhaps one of the sources of discontent is that I'm not sure the money trickles down to the authors who sign up with the publishers. You have licences between publishers and universities or any kind of group and, yes, you look at the terms. Again, licensing for having your book on the shelf in the library is different from licensing for having the book used in a classroom, but put that aside. I'm not sure the current structure actually helps the authors, who may not necessarily see the money for all these licences.

The Chair: Thank you very much. It's nice to see all the heads go up and down at the same time.

Ms. Caesar-Chavannes, you have five minutes.

● (1640)

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

I want to thank all the witnesses. I have five minutes, so I'm going to try to ask as many questions as possible.

Mr. Chisick, at the opening of your statement, you said that you agreed with the views from many of the witnesses who came ahead of us. In your opinion, what didn't you agree with, as we look to consider some of the recommendations that we are going to put forward?

Mr. Casey Chisick: That's a great question. I'm certainly concerned. I disagree with the view that Dr. Geist has expressed about term extension, for example. The example he gave about the author waking up and deciding not to write because of a 50-year term post-mortem rather than 70 years may be true, but the term of copyright is highly relevant to the decision of the publisher as to whether to invest and how much to invest in the publication and promotion of that work.

It may or may not be relevant to the writer—although I'm sure there are writers who do wake up wondering when they're going to have to get a different job—but from the commercial aspect of things, that's becoming more and more difficult every day, considering the level of investment in the dissemination of creativity, which is also a critical part of the copyright system. In my view, the extension of term from life plus 50 to life plus 70 is something that's long overdue.

Some before the committee have been suggesting that copyright in an audiovisual work ought to go to the writer or the director or some combination thereof. I disagree with that for similar reasons. It all has to do with the practical workings of the copyright system and how these ideas would work out in practice. As a lawyer in private practice dealing with all sorts of different copyright stakeholders, my primary concern is not to introduce aspects of the system that will get in the way of or perpetuate barriers to successful exploitation of commercial works. It's so important now in the digital era to make sure that there's less friction, not more.

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

Dr. Geist, you talked about the windfall that would be created with the life plus 70. How do you recalibrate the windfall that would be created by the USMCA? More specifically, can it be recalibrated within the confines of the act?

Dr. Michael Geist: It's a great question. There are really two aspects.

First, is there an implementation that would meet the requirements that we have within the act that would lessen some of the harm? When Mr. Chisick says it's about a company making a decision about whether or not to invest in a book, perhaps that's fine for any books that start getting written once we have term today, but this will capture all sorts of works that haven't entered into the public domain yet. They are now going to have that additional 20 years where they already made a decision and now get that windfall.

We ought to consider if there is the possibility of putting in some sort of registration requirement for the additional 20 years. As Ms. Gendreau noted, there are a small number of works that might have economic value. Those people will go ahead and register those for that extra 20 years, because they see value. The vast majority of other works would fall into the public domain.

Moreover, when we're thinking about broader reforms and getting into that balance, recognize that the scale has already been tipped. I think that has to have an impact on the kind of recommendations and, ultimately, reforms that we have, if one of our biggest reforms has already been decided for us.

Mrs. Celina Caesar-Chavannes: If each of you were to make one recommendation that we should consider as part of the review, what would it be?

I'll let you start.

Prof. Ysolde Gendreau: The one recommendation I would make would be to make sure that digital businesses—wherever they are—that are actively making business decisions on the basis of works that are protected by copyright should become liable for some payment. Yes, if they are totally passive then they are totally passive, but I think that by now, the experience we have is that a lot of people who are claiming to be passive are not, and are therefore avoiding liability. That would be my greatest concern.

Mrs. Celina Caesar-Chavannes: Can I go over to...? No?

It's the same question. Anybody who's ready for it, go ahead.

Dr. Michael Geist: Sure, I'll jump in.

I would say we need to ensure that the Copyright Act can continue to adjust to technological change. The way we best do that is by ensuring we have flexibility in fair dealing—that's the "such as"—and ensuring that fair dealing works both in the analogue and digital worlds. That means ensuring that there's an exception in digital lock anti-circumvention rules for fair dealing.

● (1645)

Mr. Casey Chisick: I think that introducing a provision in the Copyright Act for site blocking and de-indexing injunctions is a critical piece. I say that because so much potentially legitimate exploitation is still being diverted to offshore sites that escape the scrutiny of Canadian courts. I don't know why anybody would argue that's a good thing. Putting a balanced system in place in the Copyright Act that deals with the concerns Dr. Geist highlighted about over-blocking and freedom of expression and so on, while still making sure that Canadians can't accomplish indirectly what they can't do directly, strikes me as a very positive development in the act.

Mrs. Celina Caesar-Chavannes: Can you pick one recommendation that you would make?

Ms. Catherine Lovrics: We'll put in a recommendation that really is a practitioner's problem. There are some technical fixes to the act that I think would allow for a great deal of certainty, and those may not be issues that were raised generally before this committee.

Mrs. Celina Caesar-Chavannes: That's okay.

Ms. Catherine Lovrics: The first relates to clarifying the rights of joint authors and joint owners under the Copyright Act. Currently, under the Copyright Act, absent an agreement, what are the rights of joint owners of a copyrighted work? Can they exploit a work? Do they need the permission of another joint owner? I think that's a problem of which we're acutely aware as practitioners, and of which our client may not be.

The other is rights in commissioned works and in future works. Particularly with respect to future works, I think that oftentimes agreements will cover a future assignment. Technically, whether or not those are valid under the act is a live question. I will put those forward on behalf of IPIC.

Mrs. Celina Caesar-Chavannes: Thank you. I think I'm over time, Mr. Chair.

The Chair: Just a wee bit. Thank you very much.

It's back to you, Mr. Lloyd.

Mr. Dane Lloyd: Thank you.

My apologies to the other witnesses. I'm not picking on you enough, but I'll go with Mr. Chisick.

I had some questions about the reversionary right. A Canadian artist appeared before the heritage committee to talk about his concerns with the reversionary right, and I was wondering if you could further comment on what the replacement is and what the impact of it is.

Mr. Casey Chisick: I assume you're talking about Bryan Adams —

Mr. Dane Lloyd: Yes.

Mr. Casey Chisick: —and his proposal to adopt an American-style termination regime.

That's one of the possible approaches. What the American-style termination regime has to commend it over the current system that we have in Canada is that at least it requires some positive act by the artist to reclaim those rights. There's a window within which the rights can be claimed. Notice needs to be given, and it allows people to order their affairs accordingly. I think that the timing of Mr. Adams' submission was off. I think that it would be ill conceived to allow for termination after a 35-year period, the way it is in the United States. I think that's too short, for a variety of reasons, including reasons related to incentives to invest, but that's one approach that could be looked at.

Another approach to be looked at is the approach that's been taken almost everywhere else in the world, which is to eliminate reversion entirely and leave it to the market to deal with those longer-term interests in copyright. I don't think it's any coincidence that in literally every other jurisdiction in the world where reversion once existed—including in the United Kingdom, where it was invented—it has either been repealed or amended so that it can be dealt with by contract during the lifetime of the author. Canada is the only remaining jurisdiction, as far as I know, where that's no longer the case. That, too, should tell us something.

Mr. Dane Lloyd: Mr. Geist, maybe you could comment on that briefly. You were talking about repealing or amending Crown copyright provisions. I was hoping that you could elaborate on the application of Crown copyright. It's something that has been talked about at committee but never really fully so. Then, talk about the impact of how we can improve things by possibly getting rid of it.

Dr. Michael Geist: Sure. I'll touch on Crown copyright in just a second.

I did want to pick up on this reversion issue. It does seem to me that the U.S. is a market where there's quite a lot of investment taking place in this sector, without concern about the way their system has worked, which has given rights back to the author.

You asked earlier how individual creators handle enforcement issues, and the notion that we should take an approach that says, "You ought to handle everything. You ought to be able to negotiate every single right with large record companies or large publishers," leaves them without much power.

If there's consistency between Professor Gendreau's comments about part of the problem being the agreement between authors and publishers as we move into the digital world and your question about what Bryan Adams is doing, it's that, in a sense, we're looking in the wrong place. Much of the problem exists between creators and the intermediaries that help facilitate the creation and bring those products to market—the publishers, the record labels and the like—where there is a significant power imbalance and these are attempts to try to remedy that.

With respect to Crown copyright, I served on the board of CanLII, the Canadian Legal Information Institute, for many years, and what we found there was that the challenge of taking legal materials—court decisions and other government documents—represented a huge problem. In fact, there were some discussions regarding that earlier today on Twitter, where people were talking specifically about the challenge that aggregators funded by lawyers across the country face in trying to ensure that the public has free and open access to the law. This represents a really significant problem. This is typified by a Crown copyright approach where the default is that the government holds it, so you have to clear the rights. You can't even try to build on and commercialize some of the works that the government may make available.

● (1650)

Mr. Dane Lloyd: Are there any legitimate reasons to have a Crown copyright? It seems there could be some good reasons why it should be kept.

Dr. Michael Geist: My colleague Elizabeth Judge has written a really good piece that traces some of the history around this.

Initially, I think some of the concerns were to ensure that a government document could be relied upon, that it was credible and authoritative. I think that is far less of an issue today than it once was.

I also think that the kinds of possibilities we had to use government works didn't exist in the early days of this in the way that it does today. We think of the development of GPS services or other kinds of services built on open government or government data. The idea that we would continue to have a copyright provision that would restrict that seems anathema to the vision of a law that has adapted to the current technological environment.

Mr. Dane Lloyd: Let's say the government develops something of value to the government that would lose its value if it were to be subject to open provisions. Do you think there is still some legitimacy to Crown copyright in those cases?

Dr. Michael Geist: We are the government. The public is funding this. One of the things that I was so excited to see from Treasury Board, I believe it is, just over the last few days was taking a new position on open-source software where the priority will be to use open-source software where available. I think it recognizes that these are public dollars, and we ought to be doing that where we can. So too with funding Creative Commons licensed local journalism, which is another example of that.

Even if there are areas where we can ask, “Can't government profit?”, copyright is the wrong place to be doing it. We shouldn't be using copyright law to stop that.

Mr. Dane Lloyd: Thank you.

The Chair: We're going to Mr. Sheehan. You have five minutes.

Mr. Terry Sheehan (Sault Ste. Marie, Lib.): Thank you very much for all your testimony. It is good to have you here towards the end as well because it allows us to ask you questions about what we heard. We've been coast to coast to coast, hearing from various people with great ideas.

We heard from the Fédération nationale des communications, the FNC. They proposed the creation of a new category of copyrighted works, a journalistic work. That would provide journalists a collective administration. It would oblige Google and the Facebooks of the world to compensate journalists for their works that are put on the Internet through them. Do you have any comments about that? Also, in particular, how might it compare to article 11 of the European Union's proposed directive on copyright in the digital single market?

Michael, I'll start with you.

Dr. Michael Geist: I think article 11 is a problem. I think where we've seen that approach attempted in other jurisdictions, it doesn't work. There are a couple of European jurisdictions where it was attempted. The aggregators engaged in this simply stopped linking, and the publishers ultimately found that it hurt more than it helped.

I think we need to recognize that journalists rely on copyright and fair dealing in particular just as much as so many other players. The idea of restricting in favour of journalism really runs significant risks, given how important news reporting is.

I think it's also worth noting that I look at some of the groups that have come forward to talk about this. Some of them are the same groups that have licensed their work to educational institutions in perpetuity. To give you a perfect example, I know the publisher of the *Winnipeg Free Press* has been one of the people who have been outspoken on this issue. The University of Alberta has a great open access site about everything they license. They have quite literally licensed every issue of the *Winnipeg Free Press* in perpetuity for over a hundred years. In effect, the publishers sold the rights to be used in classrooms for research purposes, for a myriad of different purposes, on an ongoing basis.

With respect, it feels a bit rich for someone on the one hand to sell the rights through a licensing system and on the other hand ask, “How come we're not getting paid these extra ways and don't we need some sort of new copyright change?”

● (1655)

Mr. Terry Sheehan: Does anyone else have a comment?

Yes, Ms. Gendreau.

Prof. Ysolde Gendreau: What we've seen, of course, is the slow disappearance of the traditional media under the influence of online media.

It was said that in our last provincial elections in Quebec, 70% or even 80% of the advertising budget of the political parties went to service providers based outside of the country.

We're seeing closures of newspapers, and the media have difficulty keeping on giving us current news. We're now being presented with the idea that because the media are having some difficulty, because they're closing down, they should be receiving government subsidies to help them. We have people not buying newspapers or lacking access to traditional media, while the advertising revenue is going to outside companies that are not paying taxes here. The government is losing its tax base with that process and moreover is being asked to fund these newspapers and media because they need help to survive. Guess who's laughing all the way to the bank.

I think the idea of a right to remuneration for the use of newspaper articles is a way to address this kind of problem. It may not be technically the best way to do it, I'm sure, but I think there are ways to ensure that media, who have to pay journalists and want to get investigative journalism done in the country for our public good, are able to recoup the money and make sure that theirs is a real, living business, not one that is disappearing, such that people are being fed only by the lines they're getting on their phones.

Mr. Terry Sheehan: That's very interesting.

We've talked a lot about protecting indigenous knowledge and culture through copyright. We've had a lot of testimony. I was going to read some of it, but does anybody have any suggestions concerning indigenous copyright?

This can perhaps go back to you.

Prof. Ysolde Gendreau: This is a very sensitive issue and a very international issue. It is very difficult to deal with in a concrete manner because of many fundamental aboriginal issues with respect to copyright that differ from the basis of copyright as we know it. However, we can look for inspiration to our cousin countries. Australia and New Zealand have already attempted to set up systems that would help first nations in the protection of their works.

My only concern is that we must not forget that there are also contemporary native authors. I wouldn't want all native authors to feel that they are being pushed out of the current Copyright Act to go to a different kind of regime. I think there are different policy games at play here.

Mr. Terry Sheehan: Thank you.

The Chair: Thank you.

Mr. Masse is next for two minutes.

Mr. Brian Masse: I'm going to go back to Crown copyright.

In the United States, they don't even have it, in effect. I think people think about the academic aspect of this, but how does it affect us also with respect to film and private sector ventures?

Perhaps you can quickly weigh in. I know we only have a couple of minutes. It's more of an economic question than is given credence.

Mr. Bob Tarantino: Trying to navigate through the thickets of whether the National Archives owns something or what form of licence a particular item might be available under poses enormous challenges for certain sectors, such as documentary filmmakers—even with legal advice.

● (1700)

Mr. Casey Chisick: It's made that much more complicated by the lack of uniformity in licensing, by the fact that in order to license certain types of works you need to figure out which department of which provincial government you need to go to to even seek a licence, let alone worry about whether your inquiry will ever get a response. It poses enormous challenges, which I think may be associated with vesting copyright in entities that aren't really that invested in the idea of managing it.

Mr. Brian Masse: Mr. Geist.

Dr. Michael Geist: To go even further, the Supreme Court of Canada will hear a case in February, Keatley Surveying Inc. v. Teranet Inc.—and for disclosure, I've been assisting one of the parties involved—which deals with Ontario land registry records. In fact, we have governments making the argument that the mere submission of surveys to the government as part of that process renders those cases of Crown copyright.

Not only are we not moving away from lessening Crown copyright. We have arguments before the court wherein governments are trying to argue that private sector-created works become part of Crown copyright when they are submitted subject to a regulation.

Prof. Ysolde Gendreau: I would think also that there's already in the Canadian system a licence scheme that allows us to reproduce statutes with the government's permission—without seeking a specific permission. However, this is a very tiny aspect of the Crown copyright.

I think that lots of countries can live without the equivalent of a Crown copyright. This is a system where they have reinforced Crown copyright in the U.K. I don't think we should follow that train. I think it makes sense, because they are government works, that they should belong to the public, because the government represents the public. I mean, the public is the fictional author of these works. I think it also creates problems with not only statutes, but also court documents and judgments. There are interesting cases of judges who copy the notes of their lawyers. There's been a case on that, which was really interesting.

The Chair: Thank you.

Prof. Ysolde Gendreau: Despite all of that, I don't think we would be losing much by abrogating many issues of Crown copyright.

Mr. Brian Masse: Government knows fiction.

Voices: Oh, oh!

The Chair: Thank you.

We still have time, so we're going to do another round. I rarely ask questions, but I would like a question put on the floor here.

In regard to the five-year legislative review, we've heard different thoughts. Very quickly, I want to get your thoughts on that. Should it be a five-year legislative review? Should it be something else?

Prof. Ysolde Gendreau: Of course, Parliament can do anything and decide not to have five-year review next time.

I've been thinking about that, and I think that in this instance a five-year review is important. In my eyes, the clock has gone so far on the side of giving rights that it's not even Swiss cheese anymore. It's Canadian copyright cheese. It's full of holes everywhere.

We've had a bit of an example: If you don't use the private copying exception, then perhaps we can use the incidental copying exception. I mean, it's just that if one doesn't work, let's try another.

The Chair: Thank you.

Prof. Ysolde Gendreau: I think that for this kind of situation, a review now is something that we would need.

Do you want to do this exercise every five years? I'm not so sure.

The Chair: I probably won't be the chair.

Prof. Ysolde Gendreau: Also, we have to give time to cases and so on.

I think now it is important, in order not to get entrenched in the view that we have in the act currently.

Dr. Michael Geist: It's been a very interesting review. I would at the same time say that I think it is early.

If we look at it historically, there were major reforms that took place in the late eighties, major reforms again in the late nineties, and then, of course, 2012. We look at roughly a ten- to 15-year timeline historically for significant reforms.

Five years, in my view, is oftentimes too short for the market and the public to fully integrate the reforms and then to have the evidence-based analysis to make judgment calls on new reforms.

The Chair: Thank you.

Mr. Chisick.

Mr. Casey Chisick: I agree in principle with what Professor Gendreau said, which is that this is a good window for a five-year review given what happened in 2012. However, in principle, I think there should be flexibility for Parliament in deciding when to review the act, as there is for most other pieces of legislation.

● (1705)

Ms. Catherine Lovrics: As a preliminary comment—we didn't canvass the committee on this—I think our personal views are that a five-year review is completely appropriate in this case.

If you look at artificial intelligence, it is a very simple example. In 2012, that wasn't being considered, so it's for things like that, perhaps to limit shorter reviews to emerging technology, or to respond to the evolution of the law within that period of time.

The Chair: Thank you.

Mr. Graham, you have seven minutes.

Mr. David de Burgh Graham: Thank you.

I want to get back to Crown copyright, but I want to make a quick observation first. If the Berne convention had been written under current law, I think it would be coming out of copyright just about now. That's just food for thought.

If we wanted to, as a committee, make a point on Crown copyright, under what licence should we release our report? Anyone?

Dr. Michael Geist: I think the government has led by example just now with its local news and Creative Commons. Quite frankly, I don't know why almost everything isn't released by government under a Creative Commons licence.

There is an open licence that it uses. However, I think for the purposes of better recognition and standardization and the ability for computers to read it, adopting a very open Creative Commons licence would be the way to go.

Mr. David de Burgh Graham: Are there any other comments?

Mr. Bob Tarantino: Speaking personally, I would support Professor Geist's proposal, and I would recommend either a CC0 licence or a CC BY licence.

Mr. Casey Chisick: I don't have strong opinion on a particular form of licence, but I do agree that for most government works, the more dissemination and the broader dissemination, the better.

Prof. Ysolde Gendreau: I concur.

Mr. David de Burgh Graham: I like it when it's fast. Thank you.

There's a topic we haven't discussed at all in this study, and I think we probably should have. That's software patents. I'm sure you all have positions and thoughts on that.

First of all, what are your positions, very quickly, on software patents? Are they a good thing or a bad thing? Does anybody want to discuss that?

Dr. Michael Geist: I mean, we're not talking strictly copyright here, but I think that if we take a look at the experience we've seen in other jurisdictions, I think the over-patenting approach we often see creates patent thickets that become a burden to innovation, which isn't a good thing.

Prof. Ysolde Gendreau: I'd say computer patents are the hidden story of computer programs, because initially, computer programs were not supposed to be patented and that's why they went to copyright. Copyright was quick, easy and long-lasting. I think this prevented an exercise, in order to have something much more appropriate for this kind of creative activity, which has a relatively short lifespan and is based on incremental improvements.

I don't think that nationally this is something we can do, but internationally, this is an issue that should be looked at in a much more interesting way. There are so many issues that are purely computer-oriented. It would be interesting to see to what extent these issues would go with a specific kind of protection for computer programs, as opposed to bringing everything into copyright.

To a certain extent, since we've had computer programs in a copyright law, it's been difficult.

Mr. David de Burgh Graham: That's fair. I don't have time for long answers, but I appreciate your comments.

Mr. Tarantino?

Mr. Bob Tarantino: I would concur with Professor Gendreau's position.

Mr. David de Burgh Graham: I like the concurrence motions.

Yes, go for it.

Ms. Catherine Lovrics: The Intellectual Property Institute of Canada has a committee that is currently collaborating with the Canadian Intellectual Property Office on this very issue.

There may be guidance that comes jointly out of CIPO and that committee's work.

Mr. David de Burgh Graham: I was just looking at it quickly. If software was always written under current copyright law, I think that stuff written for any act would now be out of copyright. That's sort of a worrisome way of looking at it. It's kind of obsolete.

Is our copyright regime not actually strong enough to protect software, per se?

Dr. Michael Geist: I must admit, I don't think we're.... Given the proliferation of software that runs just about every aspect of our lives, from the devices in our homes to the cars we drive to a myriad of different things, there seems to be no shortage of incentive for people to create, and no significant risks in that regard.

It highlights why always looking to stronger intellectual property rules, whether patent or copyright, as a market-incentive mechanism, misses the point of what takes place in markets. Very often, it isn't the IP laws at all that are critically important. It's first to market, the way you market and the continual innovation cycle that becomes important. IP protection is truly secondary.

Mr. Casey Chisick: There are a lot of issues, some of which we've talked about today, and software patents is one, where if we're going to look at them in a serious way, we need to look at them in a serious way. We need to take a step back and consider what sort of behaviour we're trying to promote, what kinds of laws promote that behaviour and how we can best strike that balance in Canada, also with an eye to our international obligations under various treaties.

Software patents is one. Crown copyright is another. I think that if we want to look at whether Crown copyright is necessary or whether it's accomplishing its intended ends, we need to figure out what it's supposed to do before we can figure out whether we're doing it. Reversion is a third.

● (1710)

Mr. David de Burgh Graham: The reason I want to ask about all this is to tie it back to a rising movement, especially in the U.S., called right to repair. I'm sure you're familiar with that as well. You're aware of the John Deere case. Are there any comments on that and how we can tie that into copyright, to make sure that when you buy a product like this BlackBerry...? If I want to service it, then I should have that right to do that.

Dr. Michael Geist: Yes. The 2012 reforms on anti-circumvention rules established some of the most restrictive digital lock rules to be found anywhere in the world. Even the United States, which pressured us to adopt those rules, has steadily recognized that new exceptions to it are needed.

At the very top, I noted that one area. We just saw the U.S. create a specific exception around right to repair. The agricultural sector is very concerned about their ability to repair some of the devices and equipment they purchase. Our farmers don't have that. The deep restrictions we have represent a significant problem, and I would strongly recommend that this committee identify where some of the most restrictive areas are in those digital locks. We will still be complying with our international obligations by building in greater flexibility there.

Mr. David de Burgh Graham: I had a couple of questions going back to the beginning, so it's less exciting.

The Chair: You have about 30 seconds.

Mr. David de Burgh Graham: That's enough for this.

Mr. Chisick, you mentioned at the very beginning that you are certified to practice copyright law, specifically. Just out of curiosity, who certifies lawyers to practice copyright law?

Mr. Casey Chisick: I didn't say that I'm certified to practice copyright law. What I said was I'm certified as a specialist in copyright law. That's a designation that was given to me by the Law Society of Ontario.

Mr. David de Burgh Graham: Okay. That's what I was curious about.

Do we have 10 seconds to get into...? No, we don't have 10 seconds.

Thank you.

The Chair: Thanks.

Mr. Albas, you have seven minutes.

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

It's always a mad dash to get in as many interventions as we can.

I will address this question to the Intellectual Property Institute. You support changing safe harbour provisions yet we were told by a major tech company that they simply could not operate without safe harbour. Do you think a legal framework that denies Canadian consumers access to services is acceptable?

Mr. Bob Tarantino: Thank you for the question.

I think we recommended an assessment of whether the safe harbour provisions should operate without reference to any of the other mechanisms, such as the notice and notice regime, within the act.

I think the answer to the particular question you posed about consumers is probably no.

Mr. Dan Albas: Okay.

Mr. Bob Tarantino: We don't want consumers to be disadvantaged in that way.

I think it's an open question: How do we ensure entities and individuals don't shelter themselves under the auspices of those safe harbour provisions in a way that doesn't reflect the steps they take or the policies they put in place with respect to policing infringement on their platforms?

Mr. Dan Albas: Yesterday on Twitter—I didn't have the opportunity, and this is outside of your role, because I don't think you were speaking on behalf of the Intellectual Property Institute—I posted a CBC article outlining the case of someone who was suing the company that makes Fortnite for allegedly using a dance that he invented.

I put it out there and we did hear from the Canadian Dance Assembly. They wanted to see choreography of specific movements that could be copyrighted by an individual artist. You seem to say that it would be under a particular provision. Could you just clarify that a bit, so it's part of the testimony?

Mr. Bob Tarantino: I'm happy to do that.

Let this be a lesson to those who willy-nilly engage on Twitter with members of Parliament.

Yes. Choreographic works are protected if they are original. They are protected as works under the Copyright Act. I would also note that performers' performances are protected under the Copyright Act without the need for originality. I'm not sure there's a current gap in the legislative scheme, which would mean that dance moves are not protected.

● (1715)

Mr. Dan Albas: I think what the Canadian Dance Assembly was pointing out was that if someone choreographs a particular dance and posts it on YouTube, then someone else uses those moves in a performance of some sort, some credit should be due or some sort of copyright owed to the original person.

I think it would be very, very difficult to say who created a particular work of choreography or a dance. I even gave the example of martial arts.

I asked indigenous groups if it might cause huge issues for a particular community if someone were suddenly to claim copyright for a very traditional dance. There were some questions as to whether copyright would even apply to indigenous knowledge.

Mr. Bob Tarantino: I think we need to separate the analytical question of whether something would qualify for protection under the act from the practical reality of enforcing any rights that might be afforded under the act. I think those are two very different inquiries.

I would like to just freelance a little bit here and pivot on the point that you've made. I think it ties into some of the other questions that have been put forward here today.

Speaking personally, I think there is a tendency in the copyright community for the ratchet to go only in a single direction, and for rights to continually expand. I think we have to be cognizant of the fact that all of us—whether as individuals, as consumers, as creators or as entities who disseminate or otherwise exploit copyright—simultaneously occupy multiple roles within the copyright ecosystem. We both benefit and—I hesitate to say we are the victims—bear the burden of those expanded rights.

It's not always the case that copyright is the proper mechanism for recognizing what are otherwise entirely justifiable claims.

Mr. Dan Albas: I certainly agree with that.

Ms. Gendreau, in your presentation you argue that online platforms should be liable for infringing work on their platforms in the same way traditional broadcasters are.

Do you not acknowledge that a TV station where a producer determines everything on the air is different from a platform where users upload their content?

Prof. Ysolde Gendreau: They are different in the sense that they are leading different activities. They're not programming the way broadcasters are programming.

What we're facing is precisely something different because we have, again, an industry that exists because there are works to showcase or to let go on and disseminate through its services. It is making money, and it will be obtaining the possibility of making business out of these works and maybe is not paying for that primary material.

It's like mining royalties. Mining companies have to pay royalties because they are extracting primary resources. I think we have to see that our creative industries, our creative works, are our new primary resources in a knowledge economy, and those who benefit from it have to pay for it.

Mr. Dan Albas: Ms. Gendreau, you cannot create an equivalent between a physical asset that once it's mined is exclusively taken away versus an idea or a piece of work that can be transmitted where someone isn't less off. We've been told that if such a system would be in place, online platforms would have no choice but to seriously restrict what users can upload.

Do you feel severely restricting innovation is a reasonable outcome in this case?

Prof. Ysolde Gendreau: No, I don't think it would limit innovation or dissemination. I think on the contrary it would guarantee payment to creative authors, and because creative authors would be receiving payments for the use of their works, they wouldn't be trying to sue for negligible types and silly uses that have given a very bad name to copyright enforcement.

If copyright owners knew that when their works were being used they were being remunerated, then if they saw somebody making a video with their grandchild dancing to some music, and they nevertheless receive some sort of payment, they would not sue that grandmother and make a fool of themselves.

Mr. Dan Albas: Thank you for that.

Mr. Geist, you have strongly argued against extending statutory damages to Access Copyright. If the worst penalty they are allowed to seek is the amount of the original tariff, then won't educational institutions just ignore the tariff because the only penalty is their having to pay what they would have to pay to begin with?

● (1720)

Dr. Michael Geist: No. First off, educational institutions are not looking to infringe anything, as I've talked about. They license more now than they ever have before. Statutory damages, by and large, are the exception rather than the rule. The way that the law typically works is that you make someone whole. You don't give them multiples beyond what they have lost.

Where we have statutory damages right now within the copyright collective system, it's part of a quid pro quo. It's used for groups like SOCAN because they have no choice but to enter into this system, and so because it's mandatory for competition-related reasons, they have that ability to get that.

Access Copyright can use the market, and as we've been talking about, it is now one of many licences that are out there. This has become so critical, as we've learned over these months, the different ways education groups license. The idea that it would specifically be entitled to massive damages strikes me as incredible market intervention that's unwarranted.

Mr. Dan Albas: Thank you.

The Chair: Thank you.

Mr. Masse, you have seven minutes.

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

It's good that we're talking copyright. I feel that I've been infringed in my right to have a repair bill passed. There was a voluntary agreement instead. Bill C-273 was amending the Competition Act and the Environmental Protection Act to provide aftermarket service for vehicles, for technicians, for information technology. It's an environmental thing, but also a competition issue and so forth. It is pretty germane to today, because even the United States was allowing this under their laws in terms of gaining this information. I could get a vehicle fixed in the United States at an after-service garage, but I couldn't get it done in Windsor. We spent several years getting that amended, but I see that it's been moved towards I guess the larger picture of things, which is the ability to alter and change devices.

I do want to move on a bit with regard to the Copyright Board. I know that some of the testimony today was kind of removed from that, but what was interesting about the Copyright Board coming here was that they asked for three significant changes that weren't part of Bill C-86. One of the things—and I'm interested to hear if there would be an opinion—was that they wanted a scrub of the actual act, which hadn't been done since 1985.

Are there any thoughts on the Copyright Board's presentation and the fact that they don't feel that Bill C-86 is going to solve all the problems they have? They had three major points. One of them was on that. Also, the protection of their ability to make interim decisions and not be overturned was another thing they mentioned. I don't know if there are any thoughts on that, but that's one of the things that I thought was interesting about their presentation in front of us.

Anybody...? If nobody has anything because you're happy with the way it's going to be, then it's going to be that way. It's fine.

Mr. Casey Chisick: I've expressed in another forum certain concerns about Bill C-86 that are not necessarily the same as those that were expressed by the board. I don't think Bill C-86 is perfect by any means in terms of addressing the issues with the Copyright Board, but I do think it's a good start. That's the kind of legislation that certainly should be reviewed within a relatively short time frame —probably five years is about appropriate—to make sure that it's having its intended effect.

Perhaps I should have studied the transcript of that appearance a little more closely. Do I understand correctly that the suggestion was the act itself be scrubbed and that we start afresh?

Mr. Brian Masse: That's their suggestion. It's to go through it and make it consistent. I think their concern is—

Mr. Casey Chisick: Oh, I see.

Mr. Brian Masse: —that they have changes to it again. It was interesting to have their presentation about that, because it's not a holistic approach, in their opinion, and it's going to create some inconsistencies.

I know that it's a lot to throw at you right here if you haven't seen it. They talked about transparency, access and efficiency as some of the common things to be fixed. Some of those things do happen in Bill C-86, but it still hasn't gone through a review.

Mr. Casey Chisick: Any time you have successive incremental amendments to a statute, I think there are bound to be some unintended consequences when you look back on that approach. If there were an appetite for a really fulsome review, or a scrub, as you put it, of the Copyright Act, it would be an interesting idea for that reason alone: just to look at what the unintended consequences or the inconsistencies that have emerged might be. I don't know if that's what the board was getting at, but it's an interesting idea, to my mind.

● (1725)

Mr. Brian Masse: That's interesting.

Does anybody have any other thoughts?

Mr. Bob Tarantino: I don't have any response in particular to the question you pose. I just want to commend to you the submissions that IPIC did make on Bill C-86 and also the submissions that were made in 2017 on Copyright Board reform.

Mr. Brian Masse: Yes, I've seen some of those, sir. Thank you.

Dr. Michael Geist: Mr. Chair, I would note that to me this actually highlights—to come back to the chair's question about a five-year review—why five-year reviews are a bit problematic. First, the fact that we're able to address things like the Copyright Board or the Marrakesh treaty in between the period of 2012 and now highlights that where there are significant issues there is the ability for the government to act.

Second, on the idea that we would have by far the biggest changes the board has seen in decades, with new money and almost an entirely new board, that's going to take time. We know that these things still do take time, so the idea we would come back in three or four years—or even five years—to judge what takes place, much less scrub the act, strikes me as crazy. We need time to see how this works. If the board is suggesting that it needs an overhaul to make sense of things, then I think that's problematic.

Mr. Brian Masse: That's kind of the trajectory. This is what worries me right now with Bill C-86 in terms of what we've done and also the USMCA. We have three significant balls in the air all at the same time. They're all going to land, and we're going to be dealing with it at that time.

I don't have any other questions. I'm done.

Thank you, witnesses.

The Chair: Thanks.

Mr. Longfield, you have three minutes.

Mr. Lloyd Longfield: Thank you, Chair.

I'm going to go back to the right to repair. I also sit on the agriculture committee. I was also working in the innovation space in agriculture. The J1939 standard is the vehicle standard. There's an ISO standard for on-vehicle things, like steering systems, the ISO 11898, and then on the trailer for fertilizer spreaders, seeders and applicators, it's the ISO 11992. How specific do we need to go, so that innovators can get on tractors and do their work?

We could work on anything but John Deere, but I knew a guy in Regina who knew how to get around the John Deere protocols as well. People have to get around protocols and then semi-legally give you access to the equipment. How specific should the act get in terms of technology?

Dr. Michael Geist: First off, they shouldn't have to semi-legally be able to work on their own equipment. In fact, the copyright law ought not to be applying to these kinds of issues. One of the very early cases around this intersection between digital locks and devices involved a company based in Burlington, Ontario, called Skylink, which made a universal garage door remote opener. It's not earth-shattering technology, but they spent years in court, as they were sued by another garage door opener company, Chamberlain, saying that they were breaking their digital lock in order for this universal remote to work.

The idea that we apply copyright to devices in this way is where the problem lies. The origins are these 2012 reforms on digital locks. The solution is to ensure that we have the right exceptions in there, so that the law isn't applied in areas where it shouldn't be applied to begin with.

Mr. Lloyd Longfield: Could we cover those under the “such as” clause?

Dr. Michael Geist: No, you have to deal with this specifically under the anti-circumvention rules. I think it's section 41.25. The exception that you would be looking for, an ideal one, would be to bring in that fair dealing exception and make that an exception as part of the anti-circumvention rules, too. In other words, it shouldn't be the case that I'm entitled to exercise fair dealing where something's in paper but I lose those fair dealing rights once it becomes electronic or digital or it happens to be code on a tractor.

Mr. Lloyd Longfield: In terms of our innovation agenda, section 41.25 is a section we would have to take a good look at.

Dr. Michael Geist: We created a series of limited exceptions. In fact, they were so limited that we had to go back and fix them when we entered into the Marrakesh treaty for the visually impaired. The United States has, meanwhile, established a whole series of additional exceptions. Other countries have gone even further than the U.S. We are now stuck with one of the most restrictive rules in the world.

Mr. Lloyd Longfield: But we have the most innovative farmers. They can get around these things.

Thank you very much, Mr. Chair.

The Chair: Thank you very much.

Before we adjourn for the day, I'll just remind you that, on Wednesday, in room 415, for the first hour we have witnesses and for the second hour we have drafting instructions.

Also, for those listening to these proceedings throughout Canada, here is a gentle reminder that today is the last day for online submissions, by midnight Eastern Standard Time. I suspect the word is out because today we've already received 97 online submissions.

Notice that our analysts are saying, “Oh, no.”

Voices: Oh, oh!

The Chair: I want to thank our panel for being here today. It was a great session and a great wrap-up to where we've been going for this past year. Thank you all very much.

We are adjourned.