HOUSE OF COMMONS
CANADA

INTERIM REPORT ON COPYRIGHT REFORM

REPORT OF THE STANDING COMMITTEE ON CANADIAN HERITAGE

Sarmite D. Bulte, M.P.
Chair

May 2004

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THE STANDING COMMITTEE ON CANADIAN HERITAGE

has the honour to present its

FIRST REPORT

In accordance with its mandate under Standing Order 108(2), your committee has undertaken a study of the Government Status Report on Copyright Reform and has agreed to report the following:

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INTERIM REPORT ON COPYRIGHT REFORM

A. INTRODUCTION

With the coming into force of Bill C-32 in 1998, the *Copyright Act* was subjected to a major overhaul. To gauge the effectiveness of the amended Act, Section 92 requires the Minister to table a report on the provisions and operation of the Act within five years of the proclamation of Bill C-32.

This review is particularly pertinent in light of changes in technology and the digital revolution. The Government of Canada began public consultations in June 2001 with the release of two consultation papers on these issues. One paper identified several core principles for Canada's digital copyright framework: the framework rules must promote Canadian values; they should be clear and allow easy, transparent access and use; the proposals should promote a vibrant and competitive electronic commerce in Canada; the framework needs to be cast in a global context; and it should be technologically neutral.[1]

In October 2002, the federal government tabled in Parliament its five-year report, entitled *Supporting Culture and Innovation: Report on the Provisions and Operation of the Copyright Act* (the "Section 92 Report"). The Section 92 Report identified more than 40 issues for possible legislative action. It also divided the issues into three groupings: those to be dealt with in the short term (one to two years), the medium term (two to four years) and the long term (beyond four years).

In October 2003, pursuant to an Order of Reference dated 5 November 2002 and Section 92 of the *Copyright Act*, the Standing Committee on Canadian Heritage launched a statutory review of the Act. The Committee divided its study into two phases. The initial phase was to consider general issues of copyright reform. The second phase was to focus on sector-specific issues (for example, issues affecting the music industry, the broadcasting industry, the visual arts industry, etc.).

The Committee's first round of hearings began on 7 October 2003. Over the course of several meetings, officials from the departments of Canadian Heritage and Industry Canada provided the Committee with an overview of the current *Copyright Act*, the international copyright context and the issues identified for possible legislative action in the Section 92 Report. The Committee then heard from panels of witnesses who had been specifically invited to address:

[1] Industry Canada and Canadian Heritage, *Consultation Paper on Digital Copyright Issues* (Ottawa: 2001), http://strategis.ic.gc.ca/epic/internet/incrp-prda.nsf/vwapj/digital.pdf/$FILE/digital.pdf.

- the federal government's proposed reform agenda as set out in the Section 92 Report, notably the comprehensiveness of the list of issues that had been identified in the Report;

- the manner in which the reform process should unfold and the proposed timeframe for action;

- the guiding principles that should inform the reform process.

A major short-term issue to emerge from hearings was the need to implement the two 1996 WIPO treaties,[2] signed by Canada in 1997 but not ratified through legislation. Frustrated and disappointed by the numerous delays that have impeded the implementation of these two treaties, the Committee passed a motion on 23 October 2003, recommending that the ministers of Canadian Heritage and Industry instruct their officials to prepare draft WIPO treaty implementing legislation by 10 February 2004 for review by the Committee.

In response to the Committee's motion, the Minister of Canadian Heritage told the Committee on 6 November 2003 that cabinet approval for the WIPO treaty legislation had been sought since 1999; that said, a timetable for ratification was not provided. For his part the Minister of Industry indicated in a letter received on 6 November 2003 that ministerial guidance on policy proposals to address the implementation of the WIPO treaties, along with the other issues identified for short-term action, would be sought as soon as possible.

The Committee was concluding its first round of hearings on its copyright study when Parliament was prorogued on 12 November 2003.

On 9 March 2004, the new Minister of Canadian Heritage informed the Committee that the modernization of the *Copyright Act* was a top priority and that the ministers of Canadian Heritage and Industry would soon table in committee a status report on those issues that require action in the short term, including the World Intellectual Property Organization treaties of 1996. Accordingly, the Heritage Minister invited the Committee to provide its views on these issues so that the government might finalize its position and introduce a bill in Parliament to amend the *Copyright Act* later on this year.

On 25 March 2004, the Minister of Canadian Heritage and the Minister of Industry jointly submitted a *Status Report on Copyright Reform* dated 24 March 2004 to the Standing Committee on Canadian Heritage.

[2] The two World Intellectual Property Organization (WIPO) treaties of 1996 are: the WIPO Copyright Treaty (the WCT) and the WIPO Performances and Phonograms Treaty (the WPPT).

Pursuant to Standing Order 108(2), departmental officials presented the *Status Report on Copyright Reform* to the Committee during sessions held on 25 and 30 March 2004.

In light of what the Committee heard during its consideration of the Status Report, a series of Committee meetings were held on the following short-term issues between 21 and 29 April 2004:

- Private Copying and WIPO Ratification;
- Photographic Works;
- Internet Service Providers Liability;
- Use of Internet Material for Educational Purposes;
- Technology-Enhanced Learning;
- Interlibrary Loans.

To the greatest extent possible, mixed panels of witnesses with divergent interests and backgrounds (that is, creators, users, collective societies and intermediaries) were assembled to provide Committee members with the broadest possible range of perspectives and recommendations on the issues in question.

This interim report represents the culmination of the Committee's work to date on these six short-term issues. The Committee stresses that the recommendations contained herein were not arrived at easily. They stem from a careful consideration of witnesses testimony, submissions and briefs and have been formulated with the full awareness that Canada's copyright reform stakeholders are not always in agreement as to the best course of action. Given this reality, the Committee has worked, wherever feasible, from recognized points of consensus to develop what it believes are the most flexible and practical recommendations possible.

B. PRIVATE COPYING AND WIPO RATIFICATION

The Issues

The current private copying regime, sections 79 to 88 of the *Copyright Act*, provides that it does not infringe copyright to make a copy of a musical sound recording for personal use. Analysis of the private copying regime as a whole has been identified as a medium-term issue for the copyright reform process. However, some concerns have been raised that the private copying regime could be an obstacle to WIPO treaties ratification and that the relationship between the private copying regime and the WIPO Performances and Phonograms Treaty (WPPT) should be clarified.

WPPT provides for “national treatment,” that is, Canada could not treat nationals of other member countries worse than Canada’s nationals. Under WPPT, exceptions to the principle of national treatment can be made provided that the exceptions meet specified conditions. The WPPT provides that any limitations of or exceptions to rights provided for in the Treaty should be confined to certain special cases which do not conflict with a normal exploitation of the performance or phonogram and do not unreasonably prejudice the legitimate interests of the performer or of the producer of the phonogram.

Under the current private copying regime, manufacturers and importers of blank audio recording media pay a levy to the Canadian Private Copying Collective, which is a consortium of collective societies representing eligible authors, sound recording makers and performers. All “authors” (songwriters and composers) regardless of nationality are entitled to receive payment from the levy. However, with respect to the rights which fall under what is traditionally called “neighbouring rights,” including sound recording makers and audio performers, only Canadian makers and performers, and makers and performers from a country which provides reciprocal rights to Canadians, are entitled to receive payment from the levy. The issue that has been raised considers the application of WPPT’s national treatment provisions and exceptions to these provisions of Canada’s private copying regime.

Rationale

On 20 April 2004 the Committee heard testimony addressing whether Canada must modify the private copying regime in order to ratify the WPPT. That same day it passed the following motion in committee, which recommended timelines and commitments to the Department of Canadian Heritage and to Industry Canada with respect to the *Status Report on Copyright Reform* and WIPO ratification:

- That the departments respect the longstanding commitment of the Government to ratify the WIPO Treaties signed in December 1997.

- That legislation to permit ratification be introduced in the House of Commons by February 2005.

- That a memorandum to cabinet be ready to be approved by Cabinet no later than November 15, 2004.

- That items other than the WCT & WPPT as identified in the Short Term Issues in the Section 92 report be addressed on the same timeline.

The Committee concludes, after considering the submissions and testimony of the witnesses, that the private copying regime does not prevent Canada’s ratification of the WPPT. Analysis of the private copyright regime as a whole will continue as part of the copyright reform process.

RECOMMENDATION 1

The Committee recommends that the Government of Canada ratify the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) immediately.

C. PHOTOGRAPHIC WORKS

The Issues

Photographs receive unequal treatment under Canadian copyright law. Although photographs are subject to copyright, authorship and ownership is often conferred on a party who may not be the photograph's actual creator. Additionally, the term of protection offered to photographs is frequently shorter than that of other artistic works.

The general rule under copyright law is that the author is the first owner of the copyright. The Act makes some exceptions to this general principle, including an exception which applies to photographs. Section 10(2) deems the author of a photograph to be the person who owns the initial negative or, if there is no negative, the owner of the initial photograph.

The *Copyright Act* contains an additional measure specific to photographs that have been commissioned. Absent an agreement to the contrary, section 13(2) of the Act grants copyright ownership, not to the photographer, but to the party that commissioned the photograph. While this section serves to protect the interests of individuals commissioning work for private or domestic purposes, it applies equally to commercial contracts such as freelance photography work for news agencies.

The standard term of copyright protection under Canadian law is for the life of the author plus 50 years after his death. Because a corporation can be the author of a photograph, and corporations cannot die, section 10(1) and 10(1.1) of the *Copyright Act* give corporate authors of a photograph a straight 50-year term of protection from the date the photograph was taken. If, on the other hand, the author is a natural person, or a corporation controlled by a natural person, the term of protection is "life plus 50."

The WIPO Copyright Treaty calls for the minimum standard term of "life plus 50" for photographs. Current Canadian law on the copyright of photographs is otherwise WIPO compliant.

The Committee heard from a number of stakeholders who made submissions on reform of the photography provisions of the *Copyright Act*. The issue was raised that the *Copyright Act* should be amended to grant first ownership of copyright to photographers, and thus put them on par with other creators. A number of unresolved issues arose during the submissions.

- The Committee heard a submission that the *Copyright Act* must continue to ensure privacy rights for those commissioning photographs for domestic or private purposes.

- News agencies suggested that should section 13(2) of the Act be repealed, they could commission a freelance photographer to do work, pay the photographers' expenses, yet receive no ownership or control over the photographs.

- Archivists voiced a concern that they could not disseminate archival photographs to the public without being overburdened by costly legal requirements, such as finding the true copyright owner, should the law be amended.

The Options[3]

Option 1

The repeal of the presumption of authorship set out in section 10(2) of the *Copyright Act.* This would make the person who composed the photograph, that is, the photographer, the author of the work.

Option 2

The repeal of section 13(2) of the *Copyright Act*. The effect of repeal of this section would mean that ownership of copyright in photographs for commissioned works, absent an agreement to the contrary, would rest with the photographer.

Option 3

The repeal of sections 10(1) and 10(1.1) of the *Copyright Act*. This would give photographers a term of protection equal to that of other works — "life plus 50". The repeal of section 10(2) of the Act would render 10(1) and 10(1.1) obsolete, since corporations could no longer be the authors of photographs.

Option 4 (Status Report Option 23(*a*))

The replacement of section 13(2) with an exception that, absent an agreement to the contrary, ownership of the copyright in works commissioned for private or domestic purposes would rest with the party commissioning the photographs. This would give the person who commissioned and paid for the photographs ownership rights equivalent to

[3] The options presented in this report are from the Section 92 Report, the *Status Report on Copyright*, witness testimony, written submissions and briefs presented to the Committee.

those enjoyed by employers under the current section 13(3) of the Act. A similar provision exists under the Australian *Copyright Act*.

Option 5 (Status Report Option 23(*b*))

The replacement of section 13(2) with a clause that would allow the photographer to retain copyright of photographs commissioned for private or domestic purposes, but would give the commissioner of the work the power to prevent the photographer from reproducing or disseminating the work. A similar provision exists in the *Copyright Act* of the United Kingdom.

Option 6

The retention of section 13(2) in its entirety in order to protect news agencies worried that copyright in photographs would rest with freelance photographers even when the news agency had sponsored and paid the expenses incurred in producing the work.

Option 7

The clarification of the *Copyright Act* on behalf of archivists to enable them to distribute a copy of photographs to which no ownership is attributed without over burdensome legal requirements.

Rationale

The Committee feels that photographers should be given copyright protection in their works equal to that enjoyed by other artists. Historically, photographs have been treated differently from other categories of works because they were perceived to be more mechanical and less creative than other art forms. This idea is outmoded and inappropriately treats photographers differently from other artists.

The issues surrounding the dissemination of archival photographs or the status of copyright ownership for freelance photographers are not an impediment to the necessary amendments. The concerns of archivists are addressed by Bill C-8, *An Act to establish the Library and Archives of Canada*, which received royal assent on 22 April 2004. Moreover, the Committee has determined that news agencies can adequately safeguard their interests through private contractual relationships with freelance photographers.

The Committee does, however, recognize that some witnesses proposed that there be protections for those who commission photographs for private or domestic purposes. After review, the Committee concludes that existing federal and provincial privacy legislation would best address the concerns of consumers who commission photographs for private or domestic purposes.

RECOMMENDATION 2

The Committee recommends that the *Copyright Act* be amended to grant photographers the same authorship right as other creators.

D. INTERNET SERVICE PROVIDER (ISP) LIABILITY

The Issues

"Internet service provider (ISP)" is a general term for an entity that provides connections to the Internet (e.g., conduit, caching and hosting services). There is a spectrum of activities that ISPs can be engaged in: one main function is to act as an intermediary to provide network services that enable the connections between content providers and end-users. The scope of ISP liability, when acting as intermediaries, for the transmission or storage of copyrighted material using their facilities, is unclear under the *Copyright Act*. This issue of ISP liability is not formally part of the WIPO treaties; however, other jurisdictions have discussed ISP liability at the same time as the WIPO treaties.

One aspect of ISP liability is currently being considered by the Supreme Court of Canada in *Canadian Association of Internet Providers v. SOCAN* [*Tariff 22*], which considers the application of s. 2.4(1)(*b*) to ISPs. Copyright owners have the right to "communicate to the public by telecommunication." Sec. 2.4(1)(*b*) of the Act, the "common carrier" exception, provides that a person does not infringe this right if his or her only act (in respect of the communication of a work to the public) is to provide the means of telecommunication necessary for another person to communicate the work. The Supreme Court of Canada heard oral arguments in this case in December 2003 with respect to whether ISPs qualify for this exemption. Even if this exemption were to apply to ISPs, it would not, however, cover all intermediary activities that ISPs engage in.

The Committee heard testimony from representatives of Internet service providers, content owners, and other witnesses with respect to the circumstances under which ISPs, acting as intermediaries, should be held liable for transmitting and storing copyright infringing material over their facilities.

The ISPs are opposed to imposing liability on ISPs (Option 2 below) and requiring ISPs to pay a copyright levy. The ISPs are particularly concerned about the massive and uncertain liability that could result if liability were to be imposed. ISPs argue they have no practical way to monitor, scan and assess copyright ownership of material transmitted using their facilities, to limit access to such material, or to clear the copyrights to most works.

ISPs raised concerns that monitoring for copyright infringements could invade subscribers' privacy and would be time consuming and costly because the ISPs do not have contractual arrangements with individual copyright owners.

The ISPs oppose procedures which would require them to take “draconian” measures to remove content or to discontinue a subscriber’s service before there is proof that the material is copyrighted and a subscriber does not have permission to use it.

If ISPs were liable for subscribers’ infringing activities and to collect and remit royalties, the ISPs worry that prices for subscribers would increase, and subscribers might not be able to absorb the costs, which would in turn affect the number of Canadians with Internet access and the ability of ISPs to operate viably.

Copyright owners and collective societies are concerned that informal procedures do not provide enough protection for copyright owners. Copyright owners also expressed concerns about peer-to-peer transmissions. They support imposing liability on ISPs that have actual or constructive knowledge of infringing activities. Safe harbours could be provided for ISPs if they take appropriate actions to protect copyright once they are notified of potential infringement.

> Safe Harbour: A safe harbour is a legal provision which excuses liability if specified criteria are met or where there is good faith compliance with statutorily prescribed guidelines.

Rights holders also suggest that ISPs could be exempt from liability if they act as an intermediary which merely transmits content to third parties without actual or constructive knowledge of the content. Intermediaries and backbone providers receive and forward packets of data as that data travels from the host server to the end-users’ Internet access provider. Backbone providers are the network connecting the providers that retail Internet access. Backbone providers do not themselves retail Internet services. If an ISP does anything beyond a “mere backbone,” copyright owners argue there should be liability for transmission and storage of copyrighted material which involves the ISP’s facilities.

The Options

Option 1 (Status Report Option 37(*a*))

Amend the Act to exempt ISPs from copyright infringement liability when the ISPs are acting as intermediaries. Exemption from liability would apply to certain activities in which the ISPs act as “intermediaries” rather than content providers. These activities could include caching, transient reproduction, and providing links to the URLs of Internet sites with copyrighted content.

However, in order to qualify for and maintain this exemption, ISPs would be required to take certain actions or procedures to protect copyright. The Act could be amended to codify either a “notice and notice” or a “notice and takedown” procedure.

This approach acknowledges that it is primarily content providers, and not ISPs, that select, upload and exploit the material that is accessible online, while recognizing that ISPs can play a role in curtailing the circulation of infringing material.

> Notice and Notice: Under a notice and notice procedure, copyright owners notify the ISP of a subscriber’s alleged infringement of copyrighted content and the ISP agrees to notify the subscriber.
>
> Notice and Takedown: Under “notice and takedown” the ISP is required to takedown infringing copyrighted material after notice by the copyright owner. Statutory “notice and takedown” procedure could provide for judicial involvement, so that a subscriber’s content and Internet access are not removed without due process. Notice could require an affidavit under penalty of perjury. Courts could be involved to test the legitimacy of copyright infringement notices received by the ISPs.

Option 2 (Status Report Option 37(*b*))

Amend the Act to provide that ISPs are subject to liability for any copyright content on their facilities, but could escape liability if they meet certain prescribed conditions, namely timely and effective actions to respond to specified requests or proposal from rights holders regarding copyrighted material on their facilities. The statutory safe harbour could require actions of ISPs such as taking down copyrighted material when notified by a rights holder of a potential infringement, forwarding notices to subscribers when rights holders notify the ISP of alleged copyright infringement, or collecting royalties. This approach would serve to ensure that ISPs participate in rights holders’ efforts to protect their rights.

Option 3

Encourage voluntary arrangements, such as a voluntary “notice and notice” procedure or industry codes of conduct.

Rationale

Having carefully considered witness submissions and testimony on the issue of ISP liability, the Committee concludes that the “notice and notice” procedure is not enough. ISPs should not generally be exempted from liability for infringing copyrighted materials on their facilities. Any limitation on liability should apply only to activities where

ISPs act as true “intermediaries” in the sense that their actions consist solely of transmitting content provided by third parties, with no actual or constructive knowledge of the transmitted content, and where they fulfill specified safe harbour obligations. Online intermediaries should be held liable if they have actual or constructive knowledge about infringing activities on their networks. Providers of software or other systems which are designed to evade liability for copyright infringement or which are used for transmitting material that is generally infringing should not be able to take advantage of such exemptions.

Any limitations on liability for copyright infringement should be limited to “safe harbours” from liability, where the ISP has fulfilled prescribed requirements for timely and effective action to respond to specified requests from rights holders regarding copyrighted material on their facilities.

Limitations of liability should be restricted to liability for damages, thus preserving the possibility of injunctive relief for rights holders, even if the ISP is protected by a limitation.

RECOMMENDATION 3

The Committee recommends that the *Copyright Act* be amended to provide that Internet service providers (ISPs) can be subject to liability for copyrighted material on their facilities. The Committee notes, however, that ISPs should be exempt from liability if they act as true “intermediaries,” without actual or constructive knowledge of the transmitted content, and where they meet certain prescribed conditions. ISPs should be required to comply with a “notice and takedown” scheme that is compliant with the Canadian Charter of Rights and Freedoms, with additional prescribed procedures to address other infringements.

E. THE USE OF INTERNET MATERIAL FOR EDUCATIONAL PURPOSES

The Issues

Material used for public education is generally subject to copyright law. There are, however, limited exemptions for certain activities such as the display of copyright materials, performances or exams in the classroom. Further discussion on these exemptions is provided in Section F of this report (Technology-Enhanced Learning).

Educators pay a licensing fee to copyright collectives when they photocopy printed material for use in their curriculum. The copyright collectives then distribute the fees among copyright holders. Universities and school boards across Canada are increasingly using resources and material available on the Internet in assignments, lessons and

training. These Internet materials frequently reside outside the repertoire of copyright collectives.

> Licensing could take one of three forms: voluntary licensing, extended licensing, or compulsory licensing.
>
> In voluntary licensing, copyright holders and users contract directly with one another.
>
> Extended licensing allows a copyright collective society claiming to represent a "substantial" repertoire of certain types of material to be recognized as representing the entire international repertoire of such types of material, but individual authors would have a right to "opt out" of the collective society.
>
> Under compulsory licensing, copyright owners are legislatively required to allow use of their work according to statutorily described conditions and prices.

The question of ownership and enforcement of copyright on the Internet is in its infancy. The Committee heard from a number of stakeholders, ranging from existing copyright collectives to provincial government officials representing educators, on the distribution of educational materials derived from an Internet source.

Educators maintain that the Internet is primarily a medium for communication. Much of the material posted on the Internet, they argue, is created by authors who are not interested in asserting their copyright, and have no expectation of profit. Unlike commercially printed books or periodicals, material posted on the Internet may be intended from its inception to be "publicly available," that is intended to be freely available to the public without cost.

Educators have therefore proposed an expansion of the "fair dealing" exemption found under section 29 of the *Copyright Act*, to cover the use of "publicly available" material copied from the Internet for educational purposes. This exemption would be accompanied by a licensing scheme for non-publicly available material.

Copyright holders wish to encourage use of the Internet for educational purposes, and see the Internet as an important medium through which their works can be disseminated to the educational community. Copyright holders argue, however, that users of the Internet cannot assume that the material posted on the Internet is meant to be "free," in the sense of being both publicly accessible and available without cost. Copyright owners argue that merely making works available to the public to access through the Internet does not amount to a waiver of copyright.

In addition, authors raised the issue that moral rights are not adequately protected on the Internet.

> Moral rights are rights an author retains over the integrity of a work (including the right not to have the work modified or distorted or used in association with a product, service, cause or institution, to the prejudice of the author's honour or reputation) and, where reasonable in the circumstances, the right to be associated with the work as its author by name or by pseudonym and the right to remain anonymous. Moral rights are separate from the economic rights in a copyrighted work. They belong to the creator for the duration of the copyright and can be waived but not assigned.

Copyright collectives therefore want amendments to the *Copyright Act* in which the existing scheme of copyright licensing for educational purposes could be expanded to cover materials derived from an Internet source. This would be made possible through amendments to section 70 of the *Copyright Act,* tailored to enable the Copyright Board to arrange for extended collective licensing regimes.

The Options

Option 1 (Status Report Option 40(*a*))

Amend the definition of fair dealing as it relates to copyrighted material available online, expanding its scope to encompass teaching and study by educational institutions using such material. Currently, the Act's fair dealing provisions enable use of portions of copyright material for limited purposes without infringing copyright. The fair dealing purposes currently include research, private study, criticism, review and news reporting — but not specifically educational purposes.

No licence would be required for uses which are covered by an expanded fair dealing exemption. For other uses, different licensing approaches might apply, depending on whether or not the accessed material is "publicly available." One possibility is to impose compulsory licensing, i.e. mandatory authorization combined with tariffs to be paid by users and distributed to rights holders, for uses of publicly available material that are not included within an expanded fair dealing exemption.

With respect to non-publicly available material, uses that are not covered by an expanded fair dealing exemption would be subject to the normal copyright licensing requirements.

Such an approach may help to simplify the rights clearance process for educational institutions and at the same time ensure that rights holders are appropriately compensated.

Option 2 (Status Report Option 40(*b*))

Amend the Act to require that educational institutions have a blanket licence to use copyright material on the Internet. Given the enormous amount of material that is available on the Internet, voluntary licensing models are inadequate to enable authorization and facilitate access. This licence would therefore take the form of either a compulsory licence or an extended licence (allowing a copyright collective society claiming to represent a "substantial" repertoire of certain types of material to be recognized as representing the entire international repertoire of such types of material). This licensing regime should recognize that certain types of copyrighted material may be posted to the Internet by the copyright owner without expectation of payment. Sampling methods and download statistics could be used to ensure that educational institutions are not paying to use material accessed from the Internet which the copyright owner intends to be available to the public for free. The scope of these licences, with respect to types of works and permitted uses, would need to be considered.

Rationale

The Committee finds that Option 2, using an extended licensing scheme, would be a solution that recognizes the interests of both educators and copyright holders. The Committee agrees with the copyright holders' presumption that just as schools pay for desks and heating, they should also pay for intellectual property. The Committee was not convinced that educational institutions would be forced to pay for "free" material copied from the Internet. Under an extended collective licensing scheme, the collective would assign no value to material that was in the public domain or for material which the copyright owner consented to be available to the public without charge. Educators would have recourse before the Copyright Board for disputes about pricing of Internet materials. Extended licensing could also address educators' concerns for a system that would allow timely use of Internet materials.

Finally, the Committee rejects the suggestion that material accessible on the Internet is, absent notification of copyright, within the public domain. The Committee notes, however, that there was no consensus among witnesses as to an appropriate definition of "publicly available material." Accordingly:

RECOMMENDATION 4

The Committee recommends that the Government of Canada amend the *Copyright Act* to allow for extended licensing of Internet material used for educational purposes. Such a licensing regime must recognize that the collective should not apply a fee to publicly available material (as defined in Recommendation 5 of this report).

Furthermore:

RECOMMENDATION 5

The Committee recommends that publicly available material be defined as material that is available on public Internet sites (sites that do not require subscriptions or passwords and for which there is no associated fee or technological protection measures which restrict access or use) and is accompanied by notice from the copyright owner explicitly consenting that the material can be used without prior payment or permission.

F. TECHNOLOGY-ENHANCED LEARNING

The Issues

Schools from kindergarten through universities use a variety of methods to deliver course material and content to students. Sections 29.4 to 29.9 of the *Copyright Act* currently provide specific exemptions to these educational institutions allowing them to reproduce copyrighted material to facilitate learning. The exemptions detail the circumstances in which this material may be legally reproduced.

In addition to these exemptions, there is a “fair dealing” defence in section 29 that applies to reproductions made for the purposes of research or private study, review or news reporting only and does not specifically include teaching.

Many of the educational exemptions, however, do not apply when information and communications technologies are used to extend the reach of the classroom beyond its physical boundaries, such as in distance education, or to provide access to modern instructional media either on campus or away from the classroom.

As a result of the increasing use of digital technologies, the present exemptions in the *Copyright Act* should be examined to consider whether they need to be adapted to new technology and the digital environment.

Technology and technology-enhanced learning, particularly as they relate to digital or electronic issues and the Internet, have evolved at a much more rapid rate than has the law, leaving gaps in the *Copyright Act* that are out of step with modern educational realities.

Technology-enhanced learning and the use of information and communication technologies in education have become standard and basic forms of teaching and learning. Indeed, they are an expected part of curriculum content and delivery. In addition

to course Web sites providing resources and copies of course materials, information and communications technologies are used to facilitate the sharing of online documents and discussion groups, student e-mail and chat rooms. These technologies apply equally to students on campus and those who take courses via distance education.

However, the current exemptions in the *Copyright Act* do not permit digital copying of course materials nor their communication through the Internet, and educators are concerned that their use of information and communications technologies to deliver course materials gives rise to liability for copyright infringement.

In light of their concern, educators have called for a broad exemption for the use of any material “freely available” on the Internet that is used in an educational setting. They seek an amendment to the *Copyright Act* exempting educational institutions from additional copyright liability for use of information and communications technologies (in lieu of or in addition to the classroom) as a medium for delivering curriculum content, provided there are appropriate safeguards to protect access and distribution.

Rights holders are concerned that permitting digital copying and dissemination of their works and the ability to use information that is “freely available” on the Internet without compensating the rights holder will have significant effects on them.

Authors and publishers need to be remunerated for their works, and fear that permitting digital access without compensation will so seriously erode their economic interests that there will be little incentive to create new material.

Rights holders are further concerned that they will lose control of their works if digital copying and dissemination without compensation is permitted. This fear is echoed by authors who have similar concerns with respect to their moral rights.

Moreover, rights holders are leery of proposals for safeguards to protect access and distribution of digital material because they claim such technological protection measures have not proven to be effective.

Rights holders are opposed to any broadening or extension of the *Copyright Act*’s current provisions permitting educational institutions to reproduce copyrighted material to facilitate learning.

Rather than adding an educational exemption in the *Copyright Act,* rights holders favour licensing of information and communications technologies for educational purposes. They assert that licensing provides the adaptability necessary to quickly respond to changing user needs that a statute cannot.

The Options

Option 1

Amend the *Copyright Act* to clearly state that the “fair dealing” defence in section 29 applies to education and teaching purposes, in addition to research or private study, review or news reporting.

Option 2 (Status Report Option 42(*a*))

Amend the *Copyright Act* to exempt educational institutions from additional copyright liability for use of information and communications technologies (in lieu of or in addition to the classroom) as a medium for delivering curriculum content, provided there are appropriate safeguards to protect access and distribution.

Option 3 (Status Report Option 42(*b*))

Encourage voluntary licensing of information and communications technologies for educational purposes. Under voluntary licensing all interested parties would work together to meet the objectives of technology-enhanced learning, including consideration of the tools necessary to support new licensing models that take into account the rapidly evolving digital environment.

Option 4

Amend the Act to provide for extended licensing which would allow collective societies to negotiate with respect to uses involving information and communication technologies. Individual authors could opt out of the collective society.

Option 5

Amend the Act to institute compulsory licensing to cover technology-enhanced learning.

Rationale

The Committee notes that collective licensing regimes that are already in place are capable of providing the same broad service in a digital environment that they do in the paper-based environment. Such a regime would protect rights holders’ economic interests by ensuring fair and reasonable compensation for access to material. The Copyright Board can resolve disputes concerning an appropriate fee for access.

RECOMMENDATION 6

The Committee recommends that the Government of Canada put in place a regime of extended collective licensing to ensure that educational institutions' use of information and communications technologies to deliver copyright protected works can be more efficiently licensed. Such a licensing regime must recognize that the collective should not apply a fee to publicly available material (as defined in Recommendation 5 of this report).

G. INTERLIBRARY LOANS

The Issues

The Committee heard representations from several groups: the research community, creators, collectives and rights holders. While each of these groups advocated particular positions, it is important to note that these groups are not mutually exclusive. For example, researchers use library resources to create new scholarly material that may later on be used by other scholars.

The interlibrary loan network allows libraries and patrons to obtain items which are not held in one library from other libraries in the network. This service is particularly useful because not every library can own a copy of all material that may be needed. In addition to providing patrons with greater access to library material in general, interlibrary loans support and facilitate the study and research needs of library patrons across Canada and indeed worldwide. This latter activity is mainly restricted to university and research libraries and institutions.

Section 30.2 of the *Copyright Act* allows a library, archive or museum to make a copy of certain periodical articles for a patron for the purposes of research or private study. This section applies to all articles published in a scholarly, scientific or technical periodical and to articles in other periodicals which have been published more than one year previous.

This provision further allows a library (or archive or museum) to send a copy of such an article to other libraries to comply with a request made by a patron of that other library. The copy may be sent in electronic form to the requesting library. However, the Act states that the patron at the other library must not receive the copy in digital form. The patron must be given a single printed copy of the requested periodical article.

The research community views the prohibition against receiving articles in digital format as problematic. They assert that the requirement that they may only receive a printed copy of a requested article is out of step with the way research is conducted in the digital environment, where researchers seek to make efficient use of new information and

communications technologies. This puts Canadian researchers at a disadvantage to those in other jurisdictions where the electronic delivery of copyright material is permitted.

Further, the research community asserts that the present printed copy requirement causes unnecessary delay for the researcher and additional expenditures of time and money for the libraries, as libraries must tend to the necessary administrative, collation and delivery involved in making a printed copy of a requested article.

Moreover, research institutions assert that the interlibrary lending of scholarly, scientific and technical articles and articles in other periodicals which have been published more than one year previous constitute only between 2% and 3% of their total circulation — a tiny consideration in the larger lending context.

The research community is confident that sufficient technological protection measures exist to ensure that the recipient of copyright material cannot forward it to others or make more than one copy.

Rights holders, on the other hand, are concerned that electronic delivery of copyright material to library patrons will undermine the publishing industry and result in loss of income. They are further concerned that digital delivery of their works will result in the loss of control over further dissemination of their material. Authors voiced similar concerns with respect to their moral rights.

Rights holders are not convinced that current technological protection measures can adequately safeguard copyright material and thus protect the rights holders' economic interests. These witnesses argue that the ease of mass transmission of digital material makes the electronic copying of copyrighted works a fundamentally different activity that warrants stringent control lest copyright holders interests be compromised. As such, they contend that exceptions that apply in the analog world do not necessarily apply in the same way to the digital environment.

In light of these concerns, rights holders strongly resist any amendment to the *Copyright Act* that would permit the electronic delivery of copyright material to library patrons. Rather, rights holders seek a licensing model for such delivery. This model would strive for the orderly and efficient electronic delivery of copyright material to library patrons for the purpose of research or private study that both serves the user's needs for access and protects the rights holders' interests.

Another point raised was that Canada must respect its obligations under international copyright and related rights treaties, such as the Berne and Rome Conventions, and under international trade agreements, namely the North American Free Trade Agreement (NAFTA) and the World Trade Organization (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). These agreements

establish minimum standards of protection for intellectual property that are bolstered by strong dispute resolution mechanisms.

In addition to these agreements, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), concluded in December 1996, contain special provisions specifically designed to address the challenges posed to copyright by new technologies in the digital environment. Both these treaties provide that exceptions to the rights set out in them be limited to certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.[4]

Moreover, both the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty explicitly state that contracting parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under the WIPO treaties or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.[5]

The Options

<u>Option 1(Status Report Option 44(*a*))</u>

Amend section 30.2 of the *Copyright Act* to permit libraries, archives or museums, equipped with the appropriate technological safeguards, to provide a copy of an original journal article in any format for the purpose of research or private study. This option incorporates the idea of technological neutrality by updating the current paper-based exemption in s. 30.2 to include newer technologies.

<u>Option 2(Status Report Option 44(*b*))</u>

Encourage licensing of the electronic delivery of copyright material to library patrons. Under this model, rights holders would retain the ability to decide for themselves whether technological safeguards adopted by the libraries are sufficient to protect against the unauthorized dissemination of their material.

Rationale

The Committee appreciates why some witnesses argued that the exceptions that exist for analog communications do not necessarily apply in the same way to the digital

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[4] Article 10, WIPO Copyright Treaty, http://www.wipo.int/clea/docs/en/wo/wo033en.htm and Article 16, WIPO Performances and Phonograms Treaty, http://www.wipo.int/clea/docs/en/wo/wo034en.htm#P143_21153.

[5] WIPO Copyright Treaty Article 11 and WIPO Performances and Phonograms Treaty Article 18, respectively.

environment. It also recognizes that ongoing technological change has significantly transformed communications and research practices.

The Committee observes that a licensing system is capable of providing the digital delivery of copyright material to library patrons. Such a system would protect rights holders' economic interests by ensuring fair and reasonable compensation for access to material. The Committee did not hear conclusive evidence as to whether existing technological safeguards will adequately protect copyright holders. Therefore, until there are agreed standards that are sufficient to protect against the unauthorized dissemination of copyrighted material:

RECOMMENDATION 7

The Committee encourages the licensing of the electronic delivery of copyright protected material directly by rights holders to ensure the orderly and efficient electronic delivery of copyright material to library patrons for the purpose of research or private study. Where appropriate, the introduction of an extended collective licensing regime should also be considered.

H. CONCLUSION

This interim report is not an end in itself, but a starting point. The Committee is well aware that much work remains to be done. Future hearings of the Standing Committee on Canadian Heritage will study and make recommendations on the many remaining unresolved short-, medium- and long-term copyright issues that are in pressing need of examination. The Committee looks forward to addressing these issues and wishes to assure stakeholders that it is committed to seeing this exercise culminate with the passage into law of an amended *Copyright Act* that is responsive to the needs of all Canadians. With this in mind:

RECOMMENDATION 8

The Committee urges the Government of Canada to take immediate and decisive action on the issues raised in this report. The Committee is convinced that the modernization of Canadian copyright law is of the utmost importance; consequently, it sees it as essential that the federal government work in partnership with Parliament to ensure that all necessary legislative changes to the *Copyright Act* are made immediately.

Furthermore, notwithstanding the Committee's motion of 20 April 2004:

RECOMMENDATION 9

The Committee recommends:

a) **that a memorandum to cabinet incorporating the recommendations made in this interim report on copyright reform be ready for cabinet approval no later than 15 August 2004; and**

b) **that legislation to permit ratification of the WIPO treaties be introduced in the House of Commons by 15 November 2004.**

LIST OF RECOMMENDATIONS

RECOMMENDATION 1

The Committee recommends that the Government of Canada ratify the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) immediately.

RECOMMENDATION 2

The Committee recommends that the *Copyright Act* be amended to grant photographers the same authorship right as other creators.

RECOMMENDATION 3

The Committee recommends that the *Copyright Act* be amended to provide that Internet service providers (ISPs) can be subject to liability for copyrighted material on their facilities. The Committee notes, however, that ISPs should be exempt from liability if they act as true "intermediaries," without actual or constructive knowledge of the transmitted content, and where they meet certain prescribed conditions. ISPs should be required to comply with a "notice and takedown" scheme that is compliant with the Canadian Charter of Rights and Freedoms, with additional prescribed procedures to address other infringements.

RECOMMENDATION 4

The Committee recommends that the Government of Canada amend the *Copyright Act* to allow for extended licensing of Internet material used for educational purposes. Such a licensing regime must recognize that the collective should not apply a fee to publicly available material (as defined in Recommendation 5 of this report).

RECOMMENDATION 5

The Committee recommends that publicly available material be defined as material that is available on public Internet sites (sites that do not require subscriptions or passwords and for which there is no associated fee or technological protection measures which restrict access or use) and is accompanied by notice from the copyright owner explicitly consenting that the material can be used without prior payment or permission.

RECOMMENDATION 6

The Committee recommends that the Government of Canada put in place a regime of extended collective licensing to ensure that educational institutions' use of information and communications technologies to deliver copyright protected works can be more efficiently licensed. Such a licensing regime must recognize that the collective should not apply a fee to publicly available material (as defined in Recommendation 5 of this report).

RECOMMENDATION 7

The Committee encourages the licensing of the electronic delivery of copyright protected material directly by rights holders to ensure the orderly and efficient electronic delivery of copyright material to library patrons for the purpose of research or private study. Where appropriate, the introduction of an extended collective licensing regime should also be considered.

RECOMMENDATION 8

The Committee urges the Government of Canada to take immediate and decisive action on the issues raised in this report. The Committee is convinced that the modernization of Canadian copyright law is of the utmost importance; consequently, it sees it as essential that the federal government work in partnership with Parliament to ensure that all necessary legislative changes to the *Copyright Act* are made immediately.

RECOMMENDATION 9

The Committee recommends:

a) that a memorandum to cabinet incorporating the recommendations made in this interim report on copyright reform be ready for cabinet approval no later than 15 August 2004; and

b) that legislation to permit ratification of the WIPO treaties be introduced in the House of Commons by 15 November 2004.

APPENDIX A
LIST OF WITNESSES

Associations and Individuals	Date	Meeting
Department of Canadian Heritage	25/03/2004	4
Danielle Bouvet, Director, Legislative and International Projects, Copyright Policy Branch		
Susan Peterson, Assistant Deputy Minister, Cultural Affairs		
Bruce Stockfish, Director General, Copyright Policy		
Department of Industry		
Susan Bincoletto, Director, Intellectual Property Policy		
Albert Cloutier, Senior Project Leader		
Department of Canadian Heritage	30/03/2004	5
Danielle Bouvet, Director, Legislative and International Projects, Copyright Policy Branch		
Susan Peterson, Assistant Deputy Minister, Cultural Affairs		
Bruce Stockfish, Director General, Copyright Policy		
Department of Industry		
Susan Bincoletto, Director, Intellectual Property Policy		
Albert Cloutier, Senior Project Leader		
Alliance of Canadian Cinema, Television and Radio Artists	20/04/2004	7
Ken Thompson, Director, Public Policy and Communications		
Association québécoise de l'industrie du disque, du spectacle et de la vidéo (ADISQ)		
Lyette Bouchard, Assistant Director General		
Balanced Copyright Coalition		
Howard Knopf, Member		
Canadian Coalition for Fair Digital Access		
Howard Knopf, Counsel		
Canadian Private Copying Collective		
Claude Brunet, Legal Counsel, Ogilvy Renault		
Public Interest Advocacy Centre		
Susan Lott, Counsel		
Bureau of Canadian Archivists Copyright Committee	21/04/2004	8
Nancy Marrelli, Chairperson		

Associations and Individuals	Date	Meeting
Canadian Internet Policy and Public Interest Clinic	21/04/2004	8
Alex Cameron, Member		
Canadian Newspaper Association		
Anne Kothawala, President and Chief Executive Officer		
Canadian Photographers' Coalition		
André Cornellier, Photographer and Copyright Vice-President		
Canadian Press		
Ron Poling, Chief of the Picture Service		
Association québécoise de l'industrie du disque, du spectacle et de la vidéo (ADISQ)	22/04/2004	9
Stéphane Gilker, Legal Counsel (Fasken Martineau)		
Canadian Association of Internet Providers		
Jay Thomson, Assistant Vice-President, TELUS		
Canadian Cable Television Association		
Gerald (Jay) Kerr-Wilson, Vice-President, Legal Affairs		
Canadian Recording Industry Association		
Richard Pfohl, General Counsel		
Intellectual Property Institute of Canada		
Wendy Noss, Copyright Legislation Committee (Policy)		
Society of Composers, Authors and Music Publishers of Canada		
Paul Spurgeon, Vice-President, Legal Services and General Counsel		
Access Copyright	27/04/2004	10
Roanie Levy		
Canadian Educational Resources Council		
Gerry McIntyre, Executive Director		
Canadian Motion Picture Distributors Association		
Susan Peacock, Vice-President		
Copyright Consortium of the Council of Ministers of Education		
Roger Doucet, Deputy Minister, Department of Education (New Brunswick)		
Droit d'auteur, Multimédia, Internet, Copyright (DAMIC)		
Michel Beauchemin, Coordinator		

Associations and Individuals	Date	Meeting
Periodical Writers Association of Canada	27/04/2004	10
Liz Warwick, Vice-President		
Association for Media and Technology in Education in Canada	28/04/2004	11
Ross Mutton, Member		
Association of Universities and Colleges of Canada		
Steve Wills, Manager, Legal Affairs		
Canadian Library Association		
Don Butcher, Executive Director		
Canadian Publishers' Council		
Jacqueline Hushion, Executive Director		
Playwrights Guild of Canada		
Marian Hebb, Legal Counsel		
As Individual		
Ken Weber		
Association pour l'avancement des sciences et des techniques de la documentation	29/04/2004	12
Jules Larivière, Official Representative		
Canada Law Book		
Stuart Morrison, President		
Canadian Association of Research Libraries		
Graham Hill, University Librarian for McMaster		
Canadian Copyright Institute		
Grace Westcott, Executive Secretary		
Quebec Reproduction Rights Collective Administration Society		
Hélène Messier, Executive Director		
Writers' Union of Canada		
Susan Crean, Co-Chair of the Electronic Rights Copyright Committee		

APPENDIX B
LIST OF BRIEFS

Access Copyright

Association of Canadian Community Colleges

Association for Media and Technology in Education in Canada

Canadian Association of Research Libraries

Canadian Cable Television Association

Canadian Internet Policy and Public Interest Clinic

Canadian Library Association

Canadian Photographers’ Coalition

Copyright Consortium of the Council of Ministers of Education

REQUEST FOR GOVERNMENT RESPONSE

Pursuant to Standing Order 109, the Committee request that the government table a comprehensive response to this report.

A copy of the relevant Minutes of Proceedings (*Meetings Nos. 4, 5, 7, 8, 9, 10, 11, 12, 13, 14, 15 and 16 including this report*) is tabled.

Respectfully submitted,

Sarmite D. Bulte, M.P.
Chair

MINUTES OF PROCEEDINGS

Tuesday, May 11, 2004
(*Meeting No. 16*)

The Standing Committee on Canadian Heritage met *in camera* at 9:14 a.m. this day, in Room 308 West Block, the Chair, Sarmite D. Bulte, (*presiding*).

Members of the Committee present: Paul Bonwick, Sarmite Bulte, Christiane Gagnon, Nancy Karetak-Lindell, Wendy Lill and Gary Schellenberger.

Acting Members present: Larry Bagnell for Dennis Mills, Charles Hubbard for Clifford Lincoln and Diane St-Jacques for Mark Assad.

In attendance: *Library of Parliament*: Sam Banks, Analyst; Joseph Jackson, Analyst; Andrew Kitching, Analyst. *As Individual*: Elizabeth F. Judge, Consultant.

Pursuant to Standing Order 108(2), the Committee resumed its study of the Government Status Report on Copyright Reform.

The Committee resumed consideration of a draft Report.

It was agreed, — That the draft report on the Government Status Report on Copyright Reform, as amended, be adopted.

It was agreed, — That, pursuant to Standing Order 109, the Committee request that the Government table a comprehensive response to this report.

It was agreed, — That the Chair present the report to the House.

It was agreed, — That the report be entitled: “Interim Report on Copyright Reform”.

It was agreed, — That the Chair, Clerk and researchers be authorized to make such grammatical and editorial changes as may be necessary without changing the substance of the report.

It was agreed on division, — That the Committee print 550 copies of its Report in a bilingual format.

It was agreed, — That, pursuant to Standing Order 108(1)(a), the Committee append to its report, immediately after the signature of the Chair, dissenting and/or supplementary opinions provided that they are no more than 2 pages in length; (font = 12; line spacing = 1.5) and submitted electronically, if possible in both official languages to the Clerk of the Committee, no later than 5:00 p.m., on Tuesday, May 11, 2004.

It was agreed, — That a press release be prepared and sent immediately upon tabling of the Report in the House.

It was agreed, — That the Clerk of the Committee make the necessary arrangements for a press conference to be held after the tabling of the Committee's report to the House.

At 10:01 a.m., the Committee adjourned to the call of the Chair.

Rémi Bourgault
Clerk of the Committee