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Thursday, February 10, 2011

Chair

Mr. Gordon Brown

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● (1105)

[*English*]

The Chair (Mr. Gordon Brown (Leeds—Grenville, CPC)): Good morning, everyone. I call this 12th meeting of the Legislative Committee on Bill C-32 to order.

Go ahead, Madame Lavallée, on a point of order.

[*Translation*]

Mrs. Carole Lavallée (Saint-Bruno—Saint-Hubert, BQ): I'm a little surprised by the agenda this morning. It doesn't strike me as being particularly balanced.

We have one hour scheduled with a charming and intelligent witness. We know that because have already met her. That witness has already presented its views. I can understand that she may be representing another organization. However, giving one full hour to one organization, and then one full hour for three other organizations that are directly concerned by copyright is somewhat imbalanced, in my opinion.

I was wondering if you might make another suggestion, Mr. Chairman.

[*English*]

The Chair: I will turn to our clerk. He can explain how we arrived at this particular panel.

The Clerk of the Committee (Mr. Andrew Bartholomew Chaplin): In consultation with the analysts, we set it up like this because the brief of the CCLA is rather wider than what is going to concern the folks in the second panel, the Professional Writers Association of Canada, COPIBEC, and UNEQ.

That's the rationale behind why it was set up that way. Originally we were hoping to get the Canadian Bar Association as well, but they weren't able to muster their witnesses on short notice, when the panel we originally considered was unable to come together for the first hour.

[*Translation*]

Mrs. Carole Lavallée: I understand, Mr. Chaplin, that you may have had trouble scheduling groups of witnesses. It is a very complicated exercise; a three-dimensional puzzle, so to speak. I know it was complicated because we received the agenda yesterday evening at the last minute. I didn't even have time to call you back yesterday, because by the time we received our agenda, you had probably already left, which is perfectly understandable.

However, Mr. Chairman, would it be possible to cut back the time allocated for the first witness, in order to leave more time for the second group of witnesses? I don't know whether they have all arrived yet… perhaps they're already here.

[*English*]

The Chair: Thank you, Madame Lavallée. That is in fact what I was intending on doing.

We're doing our best to put the panels together. As we move out over the next few weeks, we have had more time to plan for those panels, and I think you're going to find that there's more balance in them and that we are going to see even more. We do have approximately 170 or so witnesses who wish to see the committee. I don't believe we're going to see all of them, but as we move forward, you'll see that there is going to be more balance in them because we've had more time to give people notice. We do appreciate our witnesses' coming today. If we get moving with them now, then we will have more time for the other panel.

That said, we have Nathalie Des Rosiers and Howard Knopf with us for the first panel today. They represent the Canadian Civil Liberties Association. Please go ahead; you have five minutes.

[*Translation*]

Ms. Nathalie Des Rosiers (General Counsel, Canadian Civil Liberties Association): I would like to begin by thanking the committee for inviting the Canadian Civil Liberties Association to appear this morning to present its views. I will be as concise as possible so that everyone has a chance to be heard.

Founded in 1964, the Canadian Civil Liberties Association is a national organization dedicated to the protection of civil liberties in Canada. It has expressed its views on a number of occasions in the past with respect to the need to protect freedom of expression, the right to access to information and the protection of privacy. It is in that context that it is making its submission today.

With me this morning is Mr. Howard Knopf. He is a member of the Association and specializes in copyright law.

The CCLA has five submissions to make with respect to the bill.

Our brief is currently being translated, but you will receive it shortly. I will try to be as specific as possible, and I will, of course, be available to take your questions. The first part of my presentation will be in French, and the second, in English.

The membership of the Canadian Civil Liberties Association includes artists, authors, as well as educators, teachers and members of the public. It therefore has a special interest in the possibilities and repercussions of copyright reform.

Our first concern is that consideration must be given to the fact that we are all, in different respects, both consumers and producers of copyright. It is therefore important that the legislation properly recognize that duality in each community.

Copyright is obviously a core issue in terms of the debate and discussion that occurs in society. We know that the people who produce copyright have been consumers in the past and will be again. A society that seeks progress and innovation wants to ensure that all its members have full and easy access to information that allows them to expand their reflection and their social contribution.

● (1110)

[*English*]

CCLA wants to make five submissions.

The first is on freedom of expression. We note with great interest and approval and happiness that there is a recognition of parody in the bill and that parody and satire are protected and included in fair dealing. Our perspective has been that much criticism in our society, much freedom of expression, is expressed in the form of parody and through a sense of humour, and indeed a lot of political criticism takes the form of parody and satire. It is very important that they be protected under fair dealing.

I think, however, we are inviting the committee to consider the inclusion of the words "such as" in the fair dealing provisions under proposed section 29, with a view to ensuring support for the way the Supreme Court has considered the matter in the CCH decision, to support a constant recognition that fair dealing ought not to be a closed category, and to allow some flexibility in the system. In our view, that would be a way to ensure a proper interpretation of section 29 without causing a dramatic change.

We further note that Bill C-32 does not contain a blanket immunization against statutory minimum damages for educational institutions, such as exists in other jurisdictions—the United States, for example. This indeed would be a way to better protect the access to information through the mechanism of education.

Finally, with respect to fair dealing, an exception CCLA is particularly concerned about is the proposed educational exception for educational use of publicly available material. It is good, and we should have it, but the law is for everyone. To specify an exception just for educational use raises the prospect of this being interpreted *a contrario* in a way that would invite a different interpretation for the other provisions of the act, so that's a concern.

I think it's a concern that could be met by more cumbersome language that could be specific without changing the generality of what has been done, but it would be cumbersome language. Our view is that it's not necessary to have specific exceptions for education. Generally, I think people can download what's publicly available if it's done as fair dealing, and there's no need for the specific educational exceptions.

The second part of our submission is with respect to digital locks. In our submission, digital locks ought not to trump users' rights. The anti-circumvention provisions of Bill C-32, as they presently stand, may trump users' fair dealing rights and other users' rights. This was confirmed, I think, in testimony that you heard before.

In this context, I think we have to make sure that we give the citizens the ability to protect themselves against threats. It's completely insufficient to say that Bill C-32 would allow for these exemptions—

● (1115)

The Chair: We're going to have to cut you off there. We'll get into it during the questioning.

We'll go to the Liberal Party and Mr. McTeague. You have seven minutes.

Hon. Dan McTeague (Pickering—Scarborough East, Lib.): I'm almost willing to give you, Madame Des Rosiers, a little bit more time to talk about TPMs. If you don't, I'll give you a minute or so if you want to wrap up.

Ms. Nathalie Des Rosiers: I'll just conclude the overview of our position in one minute.

Hon. Dan McTeague: I do want to go down that road with you.

[*Translation*]

I know the other parties will be very generous as well.

[*English*]

Ms. Nathalie Des Rosiers: I think it's dramatically important that we ensure that digital locks do not trump fair dealing rights; particularly, we consider that Canadians have to protect their privacy on the Internet, and we should be concerned to ensure that the privacy protection occurs throughout the bill and gives Canadians that possibility.

Thank you.

Hon. Dan McTeague: Thank you.

Mr. Knopf and Madame Des Rosiers, *merci*.

Is your concern about insufficient protection of privacy specifically related to TPMs? Is this what you're...?

Ms. Nathalie Des Rosiers: We're concerned that copyright reforms must fully comply with existing provisions. Although it contains exemptions to anti-circumventions to enable citizens to protect their own privacy, this can be rendered completely illusory because it does not allow people to sell the device that would protect their privacy. I think the average citizen would not be able to invent that device on his or her own. That's the concern. By preventing people from selling that device, you're leaving this entire field unexplored.

We should not be preventing technology from continuing to be explored. We know that companies will continue to want to have more information about their consumers and be very clever about this. At this stage, I think is our concern is to try to curtail the ability of the market to respond by imagining ways to counteract these invasive provisions.

Hon. Dan McTeague: Would you be satisfied if the Privacy Commissioner were to provide an opinion relative to the bill as it is currently drafted?

Ms. Nathalie Des Rosiers: Yes, I think for us the extent to which there could be supervision and evaluation.... I would go a little further in evaluation now, but it should be a continuing evaluation. We have an evaluation of this bill at five years. Because technology moves very fast, I think that in some cases it may be useful to invite the Privacy Commissioner to do an assessment yearly or every two years to make sure that indeed Canadians are in a position to protect their privacy.

Hon. Dan McTeague: I'll shift gears here to the exception on education. Are you comfortable with this? Exactly what would your recommendations say?

Ms. Nathalie Des Rosiers: Our recommendation is that, as it stands, it raises the prospect of it being interpreted *a contrario*. Because it specifies "for educational purposes", you can download based on what would be an implied licence. If it says "print", you can print. It does raise the prospect that outside the educational institutions, you could not do it.

For example, I'm a law professor by training. At work, I can print, but when I go home, I can't. Indeed, I think we would want to make sure it's protected. People would say it's research and so on, so maybe it's protected. I'm just concerned about the way in which it could be interpreted. That's the essence of our objection here.

Hon. Dan McTeague: Mr. Knopf, the last time we led off, I don't think you had an opportunity to respond to something that may be outside the ambit of the interests of the Canadian Civil Liberties Association, but I wanted to get your impression. You may be wearing two hats here; it's up to you, and I leave you with that discretion. Do you believe the penalties in the bill, the statutory damages, are sufficient, too high, or—as in my view—too low?

Mr. Howard Knopf (Counsel, Canadian Civil Liberties Association): Mr. McTeague, as a lawyer, I try to wear only one hat at a time, so today I'm here with Madame Des Rosiers. I'm here for the CCLA.

● (1120)

Hon. Dan McTeague: Can we expect you here a third time, Mr. Knopf?

Mr. Howard Knopf: *Peut-être.*

I can tell you that you won't hear from me in my personal capacity.

Hon. Dan McTeague: Maybe I'll get a chance to talk to you a little about it afterwards.

Mr. Howard Knopf: I think the question is probably a fair one for the CCLA, and although Madame Des Rosiers will have the last word and it's not in our brief, I'm quite confident that she and her organization would not want to see overly repressive and disproportionate penalties levied on individuals or on educational institutions.

One of the things that is specifically in our brief—she didn't get a chance to get to it, although she alluded to it *en passant*—is there's a very good need for, and other organizations such as the AUCC have suggested there should be, a specific provision in the bill whereby if an educational institution or anybody involved with an educational institution believes in good faith that they are engaged in fair dealing, such a situation should be immune from statutory damages.

There's an exactly similar provision in the United States that has been there since 1976. Nobody's complaining about it. There's no reason that we shouldn't have a similar provision in Canada. It's very simple.

Hon. Dan McTeague: Is the definition of "fair dealing" in the United States or around the world acceptable to our definition of "fair dealing"? One jurisdiction may take a very different—

Mr. Howard Knopf: In fact, the United States has a much more generous notion of fair dealing, yet they still provide a good-faith exception, so I don't know why Canada would shoot itself in the foot by rendering its professors and its students more vulnerable, with fewer restrictions, than in the United States. After all, don't we want our students and professors to be at least as smart as their American counterparts? Why would we hobble them and cripple them and make them cower in fear every time they download something?

Hon. Dan McTeague: I don't think anybody can argue that. What they will argue, though, is that there has to be a question of regime that gives a fair compensation for those who create so that the incentive remains for them to continue to create. Fair dealing is a two-way street.

Mr. Howard Knopf: In fact, there's a considerably greater compensation paid in Canada than there is in the United States. Universities do not have.... There's no equivalent to Access Copyright in the United States and there's no equivalent down there to the tariffs that Access Copyright is seeking. There's no equivalent down there to the course-pack payment and no equivalent to the annual fees.

We're already paying considerable compensation, but that's not stopping the demand for more. What we're paying now is far greater than exists in the United States and probably in most other countries.

Hon. Dan McTeague: My colleague may have a question or two.

Thanks, Chair.

Mr. Marc Garneau (Westmount—Ville-Marie, Lib.): Thank you, witnesses, for being here.

Madame Des Rosiers, you mentioned that in the context of parody and satire, under fair dealing, you wanted to include the additional two words "such as".

Ms. Nathalie Des Rosiers: Yes.

Mr. Marc Garneau: I'm not a lawyer, but my intuition is that this broadens things out quite a bit, and I was wondering if you could be a little bit more specific as to why you wanted that there.

Ms. Nathalie Des Rosiers: Indeed, I think "such as" does not broaden per se, because once you say "such as", the judge must interpret that in light of the list that's being.... It prevents too narrow an interpretation and it allows for future possibilities to be argued on the basis that they are similar to satire, parody, and so on.

The point we're making here is that there are some pressures to restrict what has been done in the interpretation of “research”, the interpretation that was put forward by the Supreme Court, and we want to prevent further restrictions of what has happened. This is a tool that we are suggesting should be looked at to ensure that the liberal way in which “research” has been proposed to be interpreted continues.

Certainly, I think CCLA wants to protect—

The Chair: I'm going to have to cut you off there.

We're going to move to Madame Lavallée for seven minutes, and possibly you can answer.

[*Translation*]

Mrs. Carole Lavallée: Good morning, Ms. DesRosiers et Mr. Knopf. We have met before. You are really lucky to have a chance to appear twice. There are a few others who would like to come back. I will be discussing that with the Chair.

It was really quite difficult to prepare for your appearance here this morning—first of all, because we were only made aware of it at 5:00 p.m. yesterday, and also because we don't have a brief and you did not prepare a written presentation. I'm sure you can understand that it's very difficult for us.

To try and bring out the salient points of your analysis, all I had in front of me was a document prepared by our analysts—who are excellent, by the way. This is what it says: “At the time of the last attempt to reform copyright in 2009, the CCLA urged the government to fully incorporate flexible fair dealing provisions, abolish or revisit Crown copyright [...]” I understand now that the term “*utilisation équitable*” corresponds to the U.S. “fair use” terminology.

● (1125)

Ms. Nathalie Des Rosiers: Yes, that's in our brief.

Mrs. Carole Lavallée: But we have not seen it.

Ms. Nathalie Des Rosiers: You will be receiving it soon. I'm sorry; things happened a little too fast.

In our brief, we suggest that a specific provision of the Act recognize the right of Canadians to access the information they have paid for. This is essentially Crown copyright. It's not a major change, since there is already an order—

Mrs. Carole Lavallée: When you talk about information, are you referring to government information?

Ms. Nathalie Des Rosiers: Yes, I mean legislation, legal decisions, research documents, and so on.

Mrs. Carole Lavallée: All right; I understand.

Ms. Nathalie Des Rosiers: As we see it, this is a great opportunity to reinstate what is already there. It's not a major change. Indeed, a Justice Department order already recognizes Canadians' right to such access. What concerns us is the fact that this is a good opportunity to achieve the same thing in legislative terms.

Mrs. Carole Lavallée: That's fine; I understand.

With respect to fair use, which you were discussing earlier with my Liberal colleagues, that is what you're looking for. The words “such as” translate as “*tel que*” in French. However, the situation in the United States and Canada is totally different. The United States has a population of a little more than 300 million, whereas Canada has 23 million Anglophones and 7 million Francophones. Furthermore, it's a well known fact that lawsuits are as natural as breathing in the United States, whereas here, we just don't follow the same practices.

In my vocabulary—and I'm pretty good in that area—that would be the equivalent of the French word “*comme*”. In other words, it is not restrictive. Those are only examples. The point is, it could be a whole range of other things, just as it could also be that. That is what the words “such as” mean. Of course, everyone will want to take advantage of the words “such as”. Do you believe that private corporations are not going to try and take advantage of this? Why, when they can afford a lawsuit here and there—and a great many of them can—would they not?

In order to please a lot of people, by allowing them to access a wide variety of documents free of charge, you seem intent on having the words “such as” added, but perhaps you haven't taken the time to reflect on what copyright started out as. Creative works belong to their creator. No one can take them away from them. Works can be temporarily ceded or transferred to someone else in exchange for money or in other ways. Creators may decide to sell their works, but those works will always belong to them. When people buy a CD, they are not buying a musical work; they are purchasing the pleasure of listening to it. People do not buy Luc Plamondon; they buy the pleasure of listening to his music on a CD. If they copy that work, or they use it in a school or somewhere else, the least they should do is pay the author for that work. I was going to say that it remains his for life. Let's just say that is almost the case.

You seem to want to respond to that.

Ms. Nathalie Des Rosiers: I think it's important to be aware of two things here. Protecting the artistic property of authors and support for artists have been part of the Association's mandate for years now.

● (1130)

Mrs. Carole Lavallée: That doesn't come through, though.

Ms. Nathalie Des Rosiers: It depends on how you approach things and the balance you're aiming for. We want to ensure not only that artists who are already active in their artistic field can receive appropriate royalties, but also that people aspiring to be artists or who are at the bottom of the ladder will also have a chance to move in that direction and access information. We definitely want to support artists all the ways that are now available—

Mrs. Carole Lavallée: Do you recommend in your brief that there be better compensation for artists?

Ms. Nathalie Des Rosiers: Certainly. There is no—

Mrs. Carole Lavallée: By introducing “fair use”, you are taking income away from artists. Under the current system in Canada, some $40 million a year is paid out to them. However, introducing “fair use” into Bill C-32 will take away at least $40 million a year. Is that how you want artists to be paid?

Ms. Nathalie Des Rosiers: I would just like to finish explaining our argument, if you don't mind. We do not think it is appropriate to restrict access to information and relevant research, particularly for the most disadvantaged members of our society, because that truly is a bridge to better things. That is the problem. If we think that doing something to support the right to education and access to information minimizes something else, and that there is no other solution, then I think we will be losing out and that we won't be approaching the debate from the proper perspective.

Mrs. Carole Lavallée: Indeed, we do not have the same perspective at all in this debate. By introducing words like "such as", and even keeping Bill C-32 as it is currently worded, given that it includes a new exception for education, we will be depriving artists of revenues, to the benefit of the educational sector.

Demonstrating a lack of respect for artistic works and artists is a very bad message to be sending to young people who are in school or university. You are basically saying that artists are "information", which clearly shows that we really are not speaking the same language. This is a very poor way of teaching our young people to respect artistic works and the value of such works. If we tell them not to worry, that it's free—an open bar—we are not teaching them any new principle with respect to the value of artists. It's important to talk about that. One of the debates we're having here has to do with the fact that artistic works are not free. Music and books are not free.

[*English*]

The Chair: Madame Lavallée, I'm going to have to cut you off there.

The NDP is not here for their round, so we'll move to Mr. Fast.

Mr. Ed Fast (Abbotsford, CPC): Thank you, Mr. Chair, and my thanks to our witnesses.

I notice how quickly you focused on the two issues that are the subject of most of the discussion around this table: the education exemption and the digital locks.

Let me deal with the first one. You've heard Ms. Lavallée already. After your appearance here, there will be publishers who will tell us that we are gutting their livelihoods and removing all their income. They suggest that up to 85% of their revenues will be gone.

I disagree with Ms. Lavallée. I think the proposal of the government is sound. It is an approach for the 21st century. Your approach is similar to ours, but you feel that we haven't gone far enough in that the educational exemption we've included is still too restrictive.

Could you expand on that and comment on the claims that the education exemption is going to remove the income of the publishers and the writers they represent?

Ms. Nathalie Des Rosiers: I'll let Mr. Knopf respond to the second question first, and then we can zero in on this.

Mr. Howard Knopf: Thank you, Mr. Fast.

Before I answer Mr. Fast's question, I'd like to respond in a few seconds to what Madam Lavallée suggested that I've—

Mr. Ed Fast: That's all right as long as it doesn't cut into my time, Mr. Chair.

Mr. Howard Knopf: I just want to say that I'm here as a counsel to the committee. I'm not here in my own capacity. I just want that on the record.

Mr. Ed Fast: Understood.

Mr. Howard Knopf: It was the same last week, and if I come again, it will still be the same.

Mr. Fast, that was a very good question. First of all, it's not the intention of the CCLA to diminish the income of writers and people who deserve income. The question is, how many times extra do they need to be paid, and do they need to be paid at the cost of educational quality?

As to including the word "education", it's not a question of whether it goes far enough or not. We've suggested that from the way the court cases are going right now, including the word "education" won't make any difference. I have no idea why anybody's upset about it. If the Federal Court of Appeal decision and the Copyright Board decision stand, the word "education" means nothing, because the Copyright Board has decided that multiple copies or anything prescribed by a teacher doesn't pass the fairness test, so the word "education" is simply window dressing, if it's there.

We suggest that we adopt some of the better practices of the U.S. legislation. In our view, the courts and the board have got it wrong. We should specify that "education" may, if it's fair, include multiple copies in the classroom, and if the professor says you really should read this, that may be part of fair dealing if it meets the six-part fairness test of the Supreme Court of Canada.

So we're suggesting a bit of a narrowing of the word "education", which should take away some of the irrational fears while overcoming the extremely restrictive condition imposed by the Copyright Board and upheld last summer by the Federal Court of Appeal. The problem with that restrictive interpretation is not that it's going to cost a lot of unnecessary money that does not get paid in the United States or China or the countries we need to compete with, but that it puts a chill in the classroom. Teachers think they can't tell the student to read something, because it's going to cost the institution a fortune. Let us suppose that an important article comes out on the front page of *The Globe and Mail*; if Madame Des Rosiers in her law school class has to teach something about an important event that happened that day, and it's timely to hand out something from the newspaper, the Copyright Board will say that those are multiple copies and that you can't do it.

● (1135)

Mr. Ed Fast: Thank you.

I want to get to my second question, which has to do with digital locks. You've suggested that digital locks should not be able to trump the fair dealing rights. The problem I have....

I'm trying to get my mind around this. In order to make sure that the fair dealing rights aren't trumped, you're also going to have to remove the provisions that prohibit the manufacture and marketing of circumvention devices. You have to remove that because you have to provide consumers with a way of getting at the fair dealing content. If you do that, eventually consumers for the most part are going to have circumvention products available—software, hardware, whatever it is.

Doesn't that render digital locks meaningless, useless?

Ms. Nathalie Des Rosiers: Well—

Mr. Ed Fast: It also opens the door to abuse. Hopefully most consumers are law-abiding citizens and will only access fair dealing content, but you and I both know—human nature being what it is—that people will abuse that, and now you're going to make it so much easier for them. In fact, the testimony we heard earlier at this committee essentially was that it goes to the very heart of anti-circumvention measures.

Ms. Nathalie Des Rosiers: In our provisions we suggest that "any person may circumvent any technological protection measure for private, non-commercial and non-infringing purposes...provided that such services and products are capable of substantial non-infringing use", so it's not a completely open door, trying to measure....

The difficulty in maintaining what is provided for here is that in a way you're really putting citizens where they are unable to protect themselves. You're trumping technology—

Mr. Ed Fast: Hold on; they're not able to protect themselves, but really it's a matter of contract. The owner of the content, the creator, says, "Listen, here's my contract, and I'm going to sell it to you—"

Ms. Nathalie Des Rosiers: But it's only in this format.

Mr. Ed Fast: Yes, "and only in this format. That's my deal. If you don't want to buy it, that's it. Find someone else who provides a similar product or don't buy it at all".

My concern is that if you go that extra step and allow circumvention for fair dealing, you've now made it so easy to allow the cheaters to undermine the system that digital locks become absolutely meaningless. The creators have no protection anymore.

● (1140)

Ms. Nathalie Des Rosiers: The example we had in mind, I think, is the one in which, for a perfectly legitimate reason, a family in Toronto with family in India says to them, "Oh, I'd really like to buy movies that I can't access here", and the movies are sent with the digital locks. It will be impossible to play them on the super-duper new theatre they've just bought. In a way, I think, to prevent them from accessing that....

They're not breaching the law. They're not doing anything illegal. It's just that there is an unfair regional distribution here that prevents them from accessing a product. Our point is simply to allow a defence here.

Mr. Ed Fast: Right, but don't you believe that the market will eventually—

Ms. Nathalie Des Rosiers: Solve this?

Mr. Ed Fast: —take into account those kinds of concerns?

It's not a perfect system, but I believe that the market and the creators will find ways of acting reasonably to allow those kinds of media transfers to take place. My understanding is that some of the digital lock technologies now will allow two or three copies to be made, so—

The Chair: Thank you, Mr. Fast.

Go ahead, Mr. Angus.

Mr. Charlie Angus (Timmins—James Bay, NDP): Mr. Chair, I would like to apologize humbly to my committee members that I am late this morning. I don't want to blame the Ottawa taxi service, so I'm not going to put the blame on anyone else other than myself for having tried to get here on time.

I know that I missed my round. I would respectfully and politely and humbly request the indulgence of a five-minute round, if my colleagues are willing to grant me that.

The Chair: Is there unanimous consent?

Some hon. members: Agreed.

The Chair: Mr. Angus, go ahead.

Mr. Charlie Angus: Thank you, Mr. Chair.

If you want to know when the next election is going to be—I want to put this into our official Hansard—you ask the taxi drivers. They know everything in this city, and they know better than any political staffers.

My colleagues in the Conservative Party are coming forward with a very interesting legal position. Their position is that the market is superior to legislated rights in the law. If the market decides something, it trumps rights that have been actually codified.

I'm interested in this because it seems to me that they're offering a series of rights that you might not be able to access, and we're being asked to pass that through the House of Commons.

Does it stand in any other form of legislation that you create a two-tier set of rights, one that exists in an analog world and one that can simply be trumped by a corporate decision in L.A.?

Ms. Nathalie Des Rosiers: Our position on digital losses is that we ought to create the possibility for the consumer to have access to material that he or she has bought with the intention of not breaching the law. That's our concern. I don't know whether that's....

Do you want to comment?

Mr. Howard Knopf: Here is a very good example of why we need to allow consumers to exercise the benefits of technology by enjoying the software that they've paid for or that their family has sent over from India with regional coding, as well as by using their hardware.

In 1982—I'm answering your question, Mr. Angus, but it's also relevant to the previous question from Mr. Fast—Jack Valenti, who was the head of the Motion Picture Association of America, very famously told Congress that the VCR was to the American entertainment industry and the American economy as the Boston Strangler was to the woman alone. He wanted to have the VCR crippled at the time by removing the TV tuner part of it. He said, "Oh my God, people are going to tape things in the afternoon and watch them at night", and Sony said yes, that was the idea.

We all know what happened: two years later, the Supreme Court said to Jack that it was good technology and it was going to go ahead; it was fair use. The rest is history. Congress and the Supreme Court saved the motion picture industry from its own foibles. Everybody was better off by allowing consumers to use this new technology.

What we're saying is that consumers should have the right to use the hardware and the software that they have legitimately acquired, so if they want to make a copy of an expensive Blu-ray to protect it from being scratched by the dog or broken by the kid, there's no problem with that. There should be no problem with that. If they want to make a copy to play in their car and they've already paid for it, there should be no problem with that.

Will the industry get it right by itself? Mr. Valenti showed that if they can possibly get it wrong, they will, to everybody's detriment—not just theirs, but society's.

● (1145)

Mr. Charlie Angus: Well, I think the Valenti example is excellent, because yesterday's pirates are now the ones demanding protection. We can go all the way back to when Hollywood was an outlaw pirate haven escaping the Thomas Edison Corporation copyrights. They created Hollywood. Then Sony were the pirates who were going to strangle the Hollywood industry because they were pushing the VCR technology. Now Sony, of course, wants to sue every kid who downloads one of their movies. What goes around comes around, and it will continue on into the next generation.

I hear my colleagues over on the other side with their blind faith in the market. It doesn't correspond to reality. When young people who buy a product try to access it and find there's a lock on it, they're told to go and talk to Sony and work it out with them. What they do is simply go and download it.

I don't know if you have seen the Herefordshire, U.K., study on downloading music; young people don't mind paying for music, but they want access. If you deny them access, they'll get it anyway.

I'm interested, though, in terms of the digital lock provisions. I know article 10 of the world copyright treaty says that within states that are signatories to the world copyright treaty, exemptions that have been defined in national law can be carried forward into the digital realm. An example is the right to parody and satire. The right to be able to extract something for parody and satire can be carried forward. It's within the WIPO Copyright Treaty. Many of our WIPO-compliant countries—19 or 20 of them at least—have language that clarifies the role of the digital lock. It protects the digital lock from counterfeit and prevents people being able to take works unfairly, but it defines the rights and guarantees the right of a nation state to allow the exemptions that have been created by law to exist.

With regard to the Conservative position on digital locks, would you suggest that it's not even more extreme than in the United States, where recently there were definitions of right of fair use to limit digital locks?

My question here is this: how do you see Canada defining digital locks in terms of our obligations internationally?

Mr. Howard Knopf: Mr. Angus, I agree that the WIPO treaties permit much more flexibility than is in this bill. We agree with that. There's no problem under the treaties about having exceptions as long as they meet the three-step test and other provisions of law, so we can allow for fair dealing and for backup copies as long as they don't impair the market or cause economic harm. We can allow for all of those things, and we can allow consumers to protect themselves.

You mentioned the example of Sony. Much more recently than 1982, just three or four years ago, Sony famously issued this CD with the so-called rootkit on it that destroyed millions of people's computers. It didn't just phone home; it went further. It crippled a number of people's computers. The irony was that under the U.S. law at the time, it was actually illegal to try to repair your computer, because you would be interfering unduly with the TPM. That's an extreme example. Obviously corporations don't wish to do that in the marketplace, but it happened.

Yes, we can have these exceptions, and those who say we can't are simply wrong in law, both international and domestic. The WIPO treaties have a great deal of flexibility, and if you read the detailed analysis, the legislative history of the WIPO treaties, which has been set out quite well in Professor Michael Geist's book, that's very clear. We can have those exceptions that allow users to do something that would otherwise be infringing.

● (1150)

Mr. Charlie Angus: My last question involves a concern I have with this legislation. I've been approached by many people who ask why I'm worrying about the digital locks and whether I really think the government's going to go into people's homes and check the fact that they're going to make backups. As well, people say that if they are told they can't access something, they're going to access it anyway. The reality is that the vast majority of consumers will simply ignore it.

My concern here is that for copyright to succeed, there has to be a public belief in the legitimacy of copyright. We have to respect copyright. If you put something in law that isn't going to be enforceable, then people believe that copyright is not enforceable, so they tend to ignore it. Consumers will ignore the provision, but educational institutions and research institutions won't. I'm worried—and I'd like to hear your opinion—about the effect on research. A digital lock in place against reverse engineering, for example, can make it illegal to study or do development. We've already seen much concern out of the U.S. in terms of research institutes basically having to have legal people on staff to deal with this issue.

The Chair: I'm sorry, Mr. Angus, but that'll have to be the last word.

Thank you very much.

We will suspend briefly.

● _____ (Pause) _____

●

● (1155)

The Chair: I call this 12th meeting of the special Legislative Committee on Bill C-32 back to order.

For the second hour, we have three witnesses with us. We have, from the Professional Writers Association of Canada, Alexander Crawley, executive director; from the Société québécoise de gestion collective des droits de reproduction, Hélène Messier, executive director; and from Union des écrivaines et des écrivains québécois, Danièle Simpson, *présidente*.

For five minutes, we'll hear from Mr. Crawley.

Mr. Alexander Crawley (Executive Director, Professional Writers Association of Canada): Thank you very much.

Good afternoon. My name is Alexander Crawley. I am executive director of the Professional Writers Association of Canada.

We represent the interests of Canadian freelance writers of non-fiction works and have been doing so for 35 years. We welcome this opportunity to offer our perspective on this reform process that is so vital to Canada's success in adapting our law to enable a thriving digital economy.

We will begin by reflecting on the committee process itself and will then highlight the issues that most affect writers and the direction we feel you must take to balance and strengthen Bill C-32. Finally, we will tell you what we like in Bill C-32.

First, we take you back to the observation of a witness you heard on the first day you opened the process beyond politicians and civil servants. Professor D'Agostino, of IP Osgoode, accurately informed you that individual creators are caught between corporate users of their works—that is, publishers, manufacturers, distributors, and retailers, and in the digital area, web-based services and ISPs—and the final recipients of our works, the individual users as consumers and as citizens. We need a law that clarifies our relationship with both types of users.

With appropriate recognition of our rights, we can negotiate with our industry partners, but we can't sustain our businesses without the fundamental principle, in the law, of compensation for use.

Next, we remind you of the testimony of freelance writer Douglas Arthur Brown on December 13 of last year. Mr. Brown provided clear evidence that illegal copying in the education sector is a real danger that is going on even now, and that by adding the term "education" under fair dealing, this bill will bring about a huge spike in such market-destroying behaviour.

We finally go to February 1, when Bill Freeman, freelance writer, and Marvin Dolgay, freelance composer, clearly outlined how this bill, as drafted, imperils their livelihoods and—more significantly, from the public interest perpective—imperils the very possibility of a new generation of creative Canadians sustaining themselves and a digital economy.

Our members' writings appear in magazines and newspapers of every size and description and in every region of Canada, online and in print. Digital technologies make their replication easy and efficient and provide the diversity of voices that give Canadians access to the rich and varied perspectives on which a healthy society depends. All of our writers encourage the copying of these works by educational institutions, corporations, government agencies, ancillary publications, online aggregators, and, of course, individual Canadians, but as with any small business, they need to be compensated for these uses of their property.

A strong system of collective rights administration is by far the most practical method of assuring appropriate compensation for these secondary uses that abound in the digital marketplace. We can and will continue to negotiate primary uses with our partners in industry. Everyone recognizes that models are changing and that the new tools can allow creators to reach the market much more efficiently than ever before. Indeed, we think we can compete with old models if we are allowed to develop our businesses through appropriate recognition of our rights in our own works.

For PWAC, the Professional Writers Association of Canada, these are our priority issues with Bill C-32.

First is the addition of "education" as an exception under fair dealing. This will deprive PWAC members of between $500 and $5,000 a year in income from secondary uses through our collectives. If the committee can't find its way to delete this provision for political reasons, we ask that at a minimum you define its application in such a way as to strengthen, not weaken, collective rights administration.

Second, on the test for fairness under fair dealing, we support the inclusion of the Berne three-step test that fulfils our international obligations, and we are heartened by indications that the committee will invoke it through the amending process. We certainly hope you do. We prefer CCH, by far, for obvious reasons.

Third, concerning the limit to statutory damages, the recent settlements in the class action suit Robertson v. Thomson and a subsequent suit involving Torstar Corporation and other publishers showed the level of damages to freelance writers that infringement can cause. The amounts there come to over $15 million paid to freelancers by major Canadian publishers. We have provided copies of the Supreme Court decision, in the first case, for your better understanding of the issue.

We have no objection to the concept of limiting damages for individual non-commercial infringement, but the system currently in place for institutional and commercial infringements should be retained.

With respect to the safe harbour provisions for ISPs, we need those who deliver our works to their markets to actively support the principle of compensation for use. Notice and notice will not change the culture of rampant illegal copying. We need a graduated response that contains a real incentive to diminish it. Better yet would be a new business model based on a true partnership with ISPs along the lines proposed by the Songwriters Association of Canada, but we understand that this is beyond the scope of this committee.

● (1200)

These are our primary issues with Bill C-32, as drafted.

On the positive side, we do appreciate some of the provisions of the bill that extend rights recognition to our fellow freelancers, such as photographers and performers. However, we fear that the weakening of our markets through the new exceptions undermines even these gains.

As to the much debated technical protection measures, we acknowledge that our industry partners in the corporate sector may find them useful, but they do not give individual creators the tools we need to fully exploit digital technology through innovation.

Thanks for your attention. I'll be glad to answer your questions, to the best of my ability, on our oral presentation or on the written brief we have provided.

The Chair: Thank you very much.

[*Translation*]

Ms. Hélène Messier, you have five minutes.

[*English*]

Ms. Hélène Messier (Executive Director, Société québécoise de gestion collective des droits de reproduction): Thanks for the invitation.

[*Translation*]

Copibec is a copyright collective society representing over 25,000 Quebec authors and publishers. It administers the rights of reproduction on paper and digital reproduction of newspapers, books and magazines, including the artistic works that they contain. Bill C-32 calls into question each of the fundamental principles underlying copyright.

By introducing approximately 40 new exceptions, it takes away the exclusive right of authors to decide for themselves whether or not they will authorize the use of their works. It also strips creators and other copyright owners of compensation that they already receive, as in the case of use for the purposes of examinations or distance education. These exceptions jeopardize substantial revenues by introducing fair dealing for education purposes—a vague and unnecessary concept. They compromise the development of new markets or existing markets, such as the reproduction of a work to display it for educational purposes or training, the production of non-commercial user-generated content, or reproduction for private purposes. What will be left of the fundamental principles which underlie copyright if authors are denied the right to dispose of their works as they see fit and to receive compensation? All that is left is the right to put digital locks on their works.

That solution does not suit the copyright owners represented by Copibec. Why? Because it is impossible to put a digital lock on a 200-page book or on the hard copy of a magazine. Furthermore, copyright owners have generally decided to provide digital books without locks to better meet consumer needs by fostering interoperable formats. Quebec publishers prefer to incorporate a watermark into the digital version of a book to allow traceability in cases of infringement. However, this is not a solution that copyright owners represented by Copibec consider acceptable, particularly because the largest users of literary works are institutional users or individuals, who almost always make copies for non commercial purposes. Bill C-32 provides for pre-determined damages ranging from $100 to $5,000 for these purposes, which is clearly less than it costs to institute court proceedings.

The bill attacks another fundamental principle of copyright: collective administration. By eliminating or jeopardizing the payment of large amounts to creators, the bill weakens copyright collectives, which withhold a percentage of the royalties collected to carry on their operations. And yet copyright collectives are an essential link in the chain, when it comes to copyright administration. That is what the legislation acknowledges in its definition of “commercially available”, which is found in section 2 and includes both purchasing a work on the market and obtaining a work through a license granted by the copyright collective. It is odd that Bill C-32 eliminates all references to collective administration in every case where mention is made of commercially available work.

If access to copyrighted works is guaranteed, why propose so many exceptions? On the contrary, use of exceptions must be sparing and carefully thought out, because they always involve an expropriation of rights. That is why the international community adopted strict rules in that area under the Berne Convention, signed by Canada in 1928, which have been since been included in many different treaties, including the well known WIPO treaties.

It is therefore surprising to see that the three-step test was not even considered during the drafting of Bill C-32. That test provides that exceptions must be limited to special cases that do not conflict with the normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.

The proposal to broaden fair use to add education will jeopardize the collection of more than $10 million in Quebec. It will certainly cause unreasonable prejudice to copyright owners and probably breaches Canada's international commitments. That is certainly the view of a number of stakeholders, including the International Association of Scientific, Technical and Medical Publishers, the International Publishers Association and the Quebec Bar, to name only a few.

Teachers will also have to cope with the vague wording of this provision, which will only be defined over time, through long and costly court proceedings. This provision is unnecessary, because access to copyrighted works is already guaranteed through the licenses administered by copyright collectives across Canada.

Last December, Ms. Line Beauchamp, the Quebec Minister of Education, Recreation and Sport expressed her disagreement with the education exception proposed in Bill C-32. Very recently, the Quebec Federation of School Boards, an important representative of users, as well as all the primary and secondary French language schools in Quebec, also expressed its opposition to Bill C-32. I am going to give that organization the last word. Here is how it stated its position:

> The adoption of this change would not only adversely affect the right of authors to allow or disallow the use of their work, but also adversely affect their right to fair compensation. We understand that the government wants to facilitate access to copyright-protected works, but we believe that access to a copyrighted work must occur in a context where the author's rights are respected. Accepting the principle that access to copyrighted works is synonymous with offering them free of charge would negate the importance of authors' contribution to our children's education, and weaken the school publishing sector. Moreover, the concept of fair use for education purposes is imprecise and would not allow educational institutions to apply clear rules to copyright administration, something that current agreements with copyright collectives now enable them to do.

Thank you.

● (1205)

The Chair: Thank you.

Ms. Danièle Simpson, you have five minutes.

Ms. Danièle Simpson (President, Union des écrivaines et des écrivains québécois (UNEQ)): Good morning, and thank you for this opportunity to address you.

The Union des écrivaines et des écrivains québécois is a professional union founded in 1977 which now represents almost 1,400 writers.

The UNEQ is recognized as the association most representative of artists working in the field of literature under the Act respecting the professional status of artists in the visual arts, arts and crafts and literature, and their contracts with promoters—R.S.Q., c. S-32.01—and consequently speaks on behalf of all Quebec writers.

In the brief we are presenting today, we have chosen to analyze the clauses that concern us one by one, in order to clearly demonstrate the extent to which writers will lose out if the bill is passed in its current form.

The government is seeking to add to the Copyright Act a whole host of exceptions with the apparent goal of balancing the rights of creators and the interest of consumers. However, the vast majority of these exceptions provide neither for remuneration nor the possibility of control by the author of the work, which we automatically consider to be contrary to the spirit of an act that is supposed to protect creators.

Furthermore, the terms used in the often imprecise wording of the bill force copyright owners to look to the courts to define the scope of these exceptions. They will have to do that at their own expense, in order to receive only minimal damages, compared to the cost of such proceedings.

Thus there will not be an appropriate balance struck between creators and users, and only after lengthy legal proceedings will we know what is legitimate and what is not.

We would now like to look at the bill in detail, starting with clause 29, which concerns fair dealing for the purpose related of education, satire or parody.

It should be noted, to begin with, that the lack of any definition of the term “education” will enable any organization that offers training to claim that its purposes are educational and thus avail itself of the fair use provisions. Furthermore, free access to these works will deprive writers of fair remuneration. Because literary works circulate extensively in the educational sector, the latter represents a significant source of income for authors. To consider depriving them of the compensation they deserve when their works are the raw material of education is unacceptable. We are therefore recommending that the term “education” be struck from clause 29.

The addition of clause 29.21 aims to legalize the use of protected content by users who wish to use this content to create a new work which is then disseminated digitally at no profit, but with no due consideration for the fact that such new works may betray the spirit of the works used, something that simply mentioning the source cannot remedy. Such an exception violates an author's moral rights and should be removed.

New clauses 30.01 and 30.04 apply to educational institutions. The first one makes it possible for these institutions to communicate a protected work as part of a lesson using telecommunications. The institution must take measures that can “reasonably be expected” to prevent students from further disseminating the work, but no penalty is imposed should it fail to do so. Furthermore, the fact that educational institutions will not be obligated to pay authors for such use constitutes unprecedented prejudice which no one else involved in education would accept.

The second clause allows institutional institutions to use works available on the Internet for education purposes. At the present time, a work is protected under the Copyright Act as soon as it exists in some material form, whatever that may be. Clause 30.04 removes that protection in an educational setting. Yet collective administration would, in both cases, afford access to these works while compensating authors. We therefore recommend that clauses 30.01 and 30.04 be removed.

Clause 30.02 extends the license to photocopy by treating digital reproduction and print reproduction as one and the same thing, thereby allowing their costs to be assessed on the same basis, without regard for the possible dissemination of the work. We recommend that this clause be re-drafted to make a clear distinction between digital reproduction and print reproduction, with compensation adjusted accordingly.

As regards levies for private copying, the UNEQ believes that a modern Copyright Act should extend levies to new digital formats and provide compensation to all artists. in all areas, including literature.

With respect to those measures aimed at making Internet service providers accountable, the UNEQ believes that the notice and takedown system is the only one that ensure adequate protection of works disseminated over the Internet. The notice-and-notice approach is too weak and forces creators to police the web themselves, a burden that is disproportionate.

In summary, the UNEQ believes that Bill C-32, which purports to modernize the Act, actually greatly increases the number of exceptions, thus depriving writers and artists of fair compensation; denies their right to approve or not the use of their works; remains vague as to the meaning of the terms used in the bill, leaving it up to the courts to interpret them; sets laughable fines, compared to the costs that would be incurred; removes any accountability for Internet service providers; ignores Canadian copyright collective societies' successful negotiations; and endangers the book industry and the development of new markets in the educational sector.

● (1210)

We are therefore asking that Bill C-32 be completely overhauled so as to provide adequate compensation for the use of copyrighted works and to ensure that any exceptions are consistent with the terms of the Berne Convention. We are also asking that collective administration be recognized as the safest way to guarantee respect for the rights of creators and access to their works.

Thank you for your attention.

● (1215)

[*English*]

The Chair: *Merci.*

We'll start the first round of questioning for seven minutes.

Go ahead, Mr. Rodriguez.

Mr. Pablo Rodriguez (Honoré-Mercier, Lib.): Thank you, Mr. Chair.

[*Translation*]

Good morning and welcome to the committee. Thank you for being here.

Ms. Messier, you said that Bill C-32 is an attack on collective administration. This is not a partisan question, although those are strong terms: do you believe that it is a direct and voluntary attack on collective administration, or that it is an indirect effect—collateral damage, as they say?

Ms. Hélène Messier: I cannot presume to know what the drafters had in mind. However, what I noted is that wherever there was a definition including the concept of collective administration—for example, visual display of works or for exams—those exceptions only applied when the work was commercially available. The definition of "commercially available" had two parts to it: either the work could be purchased commercially or it would be available through licensing from a collective society. In both cases where that definition appeared, Bill C-32 removed the second part of that definition—in other words, collective administration.

It's obvious that by taking away compensation from authors or copyright owners that was channelled through a collective society, and by jeopardizing the livelihood of creators and copyright owners by forcing them to defend their rights before the courts, there will necessarily be fewer revenues collected by copyright collectives to cover their own administrative costs. As a consequence, they will be deprived of the possibility of distributing revenues to copyright owners.

Now, is that intentional or is it collateral damage? I will let you draw your own conclusions.

Mr. Pablo Rodriguez: No, because this is—

Ms. Hélène Messier: But it is surprising.

Mr. Pablo Rodriguez: This is not a partisan question. The solution may be quite different, depending on the original intent. The impact may also be different. One is more difficult to correct than the other. If it's voluntary, it will not be possible to do anything. However, if it's simply a collateral effect, there may be things we can discuss to try to correct accidental mistakes.

That is what I'm trying to understand.

Ms. Hélène Messier: I must say that even it was intentional, it would easy enough to correct. All you would have to do is reinstate the definition of "commercially available" as it currently appears in the Copyright Act.

Mr. Pablo Rodriguez: Well, in that case, there would necessarily be some political debate.

Ms. Hélène Messier: That, too, is feasible.

Mr. Pablo Rodriguez: Yes, but it leads to a more complicated political debate.

You referred to the introduction of 40 or more new exceptions through this bill.

Ms. Hélène Messier: Yes, I believe there are 46 exceptions.

Mr. Pablo Rodriguez: And how many affect you?

Ms. Hélène Messier: A good 12 or 15 affect us directly. There are some that are of general application, such as private copying or user-generated non-commercial content, and so on. Those affect all categories of copyright owners, including us.

Mr. Pablo Rodriguez: If I'm not mistaken, none of these exceptions, other than two, provide for compensation. Which ones are they?

Ms. Hélène Messier: Now, the licenses we currently have with schools with respect to photocopying are being extended to include print reproduction and digital distribution of copyrighted works.

Mr. Pablo Rodriguez: So, there is compensation.

Ms. Hélène Messier: It's not absolutely clear whether compensation will remain the same or whether it can be negotiated based on other conditions. At least it is not being abolished, which is a definite improvement over to other provisions.

Furthermore, people with a visual impairment will be allowed to reprint and import works. That can be done through tariffs paid to collective societies for copyright owners.

Mr. Pablo Rodriguez: I believe I heard you say that the bill as a whole, or through certain exceptions, violates some of our international commitments. Could you be more specific in that regard?

Ms. Hélène Messier: The Canadian government has ratified a number of treaties, including the WIPO treaties, the Berne Convention and the TRIPS Agreement. All of these treaties include a provision under which exceptions relating to copyright must be limited to special cases which do not conflict with the normal exploitation of the work or the interests of creators.

In that regard, I am not the only one to be of that view. Several experts provided testimony before the legislative committee studying Bill C-32, including Ysolde Gendreau of ILAA Canada, and Georges Azzaria. The Quebec Bar and a number of other international associations have written many letters on this issue. In their opinion, the exceptions proposed by the Canadian government, particularly regarding fair use, contravene Canada's international obligations, because they are far too broad. Furthermore, given that they are already subject to remuneration, they will necessarily conflict with the rights of copyright owners.

● (1220)

Mr. Pablo Rodriguez: Thank you, Ms. Messier.

This is addressed to the three of you.

In the past, I've heard some say that this will indeed result in more cumbersome legal processes. These same people added that this may mean that writers or publishers will be forced to go to court, but that this would ultimately by paid by collective societies. Their conclusion was that they were complaining for nothing, because writers will not be the ones paying the legal fees; rather, their collective societies will.

Would you care to comment on that?

[*English*]

Mr. Alexander Crawley: If I may, the collectives give all of their money to the rights holders except for what they need to administer.

[*Translation*]

Mr. Pablo Rodriguez: So you don't approve of that.

[*English*]

Mr. Alexander Crawley: If we have to go to court for 10 years, that's our money that's being spent. As Mr. Freeman, I think, pointed out the other day, our money is being spent on lawyers instead of feeding our families.

[*Translation*]

Mr. Pablo Rodriguez: Let's come back to education now.

If I'm not mistaken, you are asking that the term "education" be deleted from Bill C-32. We agree with you on the fact that this is a step backward that presents a risk for creators, and that it is not balanced in that respect. However, for other reasons, we don't go as far as to suggest removing that term, because education is important. What we want to do is limit the impact on creators as much as possible.

Do you have something in mind?

The solution I have been thinking of is in two parts. First of all, "education" would be defined in as restrictive a fashion as possible, excluding professional training. Second, the test would have to be as rigourous as possible, in order to limit use of this exception.

Do you have any comments on that?

[*English*]

Mr. Alexander Crawley: Definitely, we would prefer it. We don't think that the word "education" needs to be in there. We think that private study and so on—

Mr. Pablo Rodriguez: I got that.

Mr. Alexander Crawley: I'm not a lawyer. I'm sure you're all familiar with this document that was published a week ago today. In our coalition, we do have some very intelligent legalists are working on amendments, as I mentioned in the written brief that we submitted to you, but we're not prepared to bring them forward because we're still hoping that perhaps, with the will of the committee, you'll see that this huge broad exception that you can drive a truck through could be removed, and we could still have a bill that works reasonably well.

In fact, the system we have now of licensing our works through our collectives, despite what Mr. Knopf said in the last panel, is not a fortune. It's a tiny percentage of what it costs for education.

The Chair: I'm going to have to cut you off there.

Mr. Alexander Crawley: We believe the system that we have now is working well.

The Chair: We're going to move to Madame Lavallée for seven minutes.

[*Translation*]

Mrs. Carole Lavallée: Thank you very much. Since I only have seven minutes, I am going to move quite quickly.

Ms. Messier, I'd like to talk about fair use. Ms. DesRosiers, who appeared before you, told us that she saw no reason why fair use, applied to the educational sector, would take away compensation from artists. She even said that by adding the words "such as" or "*tel que*", in French, something which would bring our system closer to the one in the United States, would allow artists, and people who aspire to become artists, obtain more information.

I then asked her how these artists would be remunerated. I obviously did not get a very convincing answer. I would like to hear your views on this. How can we take away royalties from our creators, while exempting the education sector from having to pay them, and at the same time tell them that they will continue to receive them?

● (1225)

Ms. Hélène Messier: I'd like to give you an overview of the situation in Canada. There was copyright prior to CCH, and there will be copyright after CCH.

Mrs. Carole Lavallée: What is CCH?

Ms. Hélène Messier: It is the ruling in the CCH case. That was the case involving CCH and the library of the Law Society of Upper Canada.

That ruling was of critical importance in terms of our approach to exceptions and the way exceptions are handled in Canadian law. I think that is where the difference is. Prior to the CCH decision, exceptions provided for in copyright legislation were interpreted in a restrictive manner. There weren't many in the Act. The principle that lawyers around the country have all been taught—

Mrs. Carole Lavallée: You're a lawyer.

Ms. Hélène Messier: — is that, under the common law, exceptions are interpreted in a restrictive manner. In the final analysis, the exceptions have little impact on the rights of creators and the court's approach was to limit them.

The ruling in the CCH case developed a concept which, as far as I know, exists nowhere else in the world—namely, the rights of users. It didn't say that users are entitled to exceptions, but it did say that where exceptions are provided for in the Act, they should be broadly and liberally interpreted in order to give effect to users' rights.

Mrs. Carole Lavallée: That is what distinguishes us from the United States. So, the same legal proceedings would have a different result in the United States, Canada and Quebec.

Ms. Hélène Messier: Exactly ever since the ruling in the CCH case, I would say that exceptions receive an even broader interpretation in Canada than they do in the United States. Why? Because in the United States, there is not this notion of users' rights; furthermore, in the tests that have been developed—there are some as well in the CCH decision—the emphasis is on the effect on the market, something that you do not find in Canada. The effect on the market is one of a number of factors.

What they're also looking at in the United States are alternatives, as we are in Canada. However, the United States has determined that having a license through a copyright collective is a valid alternative, something the Supreme Court did not do.

So, creators and rights holders are right to be very concerned about the effect of these exceptions, because in Canada's case, these exceptions have an inordinate effect. If you include an exception in the legislation, it will have an effect. There is a principle in law that says that lawmakers say things for a reason. The words they choose will have an effect and will be broadly and liberally interpreted. That's why exceptions are now so dangerous and there is a need to be that much more cautious when considering including one in the Act. You have to be certain of the effect you are seeking with the exception.

Mrs. Carole Lavallée: So, in your opinion and as a result of the CCH decision, the addition of an exception for education—basically exempting the educational sector as a whole—would have the effect of exempting it from the obligation to pay copyright.

Ms. Hélène Messier: No, we will have to look to the courts to determine what effect it will have. That's why we are saying that it jeopardizes the current arrangements. It will necessarily have a broad effect, but we will only know its true effect 10 or 12 years from now, when the Supreme Court has ruled on it.

That is why the Quebec Federation of School Boards, which represents primary and secondary level schools in Quebec—among other groups—has said that it doesn't want this. And teachers do not necessarily want to have to cope with the legal uncertainty for the next 10 years or spend money on legal proceedings, rather than investing that money in the educational system or using it to compensate creators.

Mrs. Carole Lavallée: And I presume that no royalties will be paid during the 10 or 12 years that legal proceedings are ongoing.

Ms. Hélène Messier: Exactly. If users refuse to pay because they believe that their use of the work is fair, there will be no compensation. In the case of Access Copyright, the tariff was imposed by the Board. It was then challenged by the Council of Ministers of Education, with the exception of Quebec, and the money was held in trust. So, there are tens of millions of dollars sitting there that cannot be distributed to rights holders and from which no management fees can be deducted either in order to pay for the legal proceedings, because we are still waiting for a final decision from the court on this.

Mrs. Carole Lavallée: How long has the licensing system been in place?

Ms. Hélène Messier: In Quebec, it has been around for almost 30 years. The first license between what was known at the time as l'Union des écrivains and the Ministry of Education was signed in 1982, and it's a system that works well.

Mrs. Carole Lavallée: And what is the situation in Canada? Do you know?

Ms. Hélène Messier: It came about a little later.

[*English*]

Mr. Alexander Crawley: Our friends from the Conservatives may remember when Flora MacDonald was our minister. It was she who helped us get that set up, and we've been doing it ever since. I think it was maybe in the early 1980s.

● (1230)

[*Translation*]

Mrs. Carole Lavallée: Is it working well at this time?

Ms. Hélène Messier: It's working very well and, contrary to what Mr. Knopf was saying, a similar system also exists in the United States under the Copyright Clearance Centre. The Americans also have a program to release works used in what are called course packs. The rates are much higher than here in Canada. They can easily be as high as 25¢ a page, whereas the rate applied by Access Copyright is 10¢ per page, and Copibec's rate is on a per student basis. So, it's based, not on an amount per page, but rather per full-time student.

Mrs. Carole Lavallée: And how much can an artist to expect to receive in royalties on a yearly basis? Let's take the example of Copibec.

Ms. Hélène Messier: It's based on use. Under our system, teachers have to report the works that are being used so that rights holders can be as fairly compensated as possible. The more often their work is reproduced, the more remuneration they receive.

We issue a cheque for a minimum of $25, but the maximum can be as high as several thousand dollars, depending on how much the work is used. There is an exception for exams, but when a work is used for a mandatory French exam and 70,000 copies are made in Quebec, an author can expect to receive several thousand dollars for the use of his or her work in that context. That will became an exception under Bill C-32.

[*English*]

The Chair: We'll have to wrap up there.

Go ahead, Mr. Angus, for seven minutes.

Mr. Charlie Angus: Thank you.

Thank you very much for coming this morning.

Mr. Crawley, I ran an independent magazine for 10 years, and we were always beating the crocodiles out of the boat to publish month to month. In that 10 years, we saw terrible winnowing in print media. Print resources had almost gone to nil, and the few magazines that paid good rates got tighter and tighter, yet now the industry is becoming one of the success stories in our digital age. The Canada magazine fund has been working. Online publications are starting to come out. There's the whole movement towards a value-added approach in maintaining independent Canadian production.

What would you say is the state of the nation now with regard to magazines and the ability of freelancers to participate in that area?

Mr. Alexander Crawley: I have great hopes for it. Of course, the magazine industry in Canada depends on freelancers to a huge extent. The smaller ones can't afford staff writers, and the larger ones have been through some difficulties. They have been letting go of staff and using more freelancers.

We are always working with them to try to improve the rates. We don't think they're overly generous, but we're quite happy to do that. We're not asking for the copyright law to change that relationship.

Actually, magazines have the greatest penetration of any Canadian cultural product, compared to films or even television, in terms of viewers. I think the most recent figures are that 50% of magazine reading, or more, is of Canadian magazines, and that's all good for us.

We're facing some difficulties, but we think this shift into digital is going to make for better partnerships. The costs of distribution will be less. We hope that our partners in Magazines Canada will continue to invest in quality and pay us for that quality, and that people will actually seek compelling works.

We're actually quite hopeful, all things being equal, that if we get a good copyright bill, it will help us to build those new business models.

Mr. Charlie Angus: Thank you.

The largest class action copyright infringement suit in Canadian history was in the neighbourhood of $6 billion for 300,000 illegally distributed works.

It wasn't against isoHunt; it was against CRIA, because CRIA was taking the works of musicians and not bothering to pay them. It was known as the Chet Baker case. Poor Chet used to get paid in cash to play phenomenal works, and it was his estate that asked about all the records they'd been putting out in his name for decades. I don't think they settled anywhere near the $6 billion figure, but it does show the incredible power that the few large players have over the individual artists. They don't seem to mind ripping off artists whenever it suits them.

I'm interesting in having you update us on the Heather Robertson case and the issue of the rights of freelancers.

● (1235)

Mr. Alexander Crawley: As Mr. Knopf mentioned in the last panel, the courts don't always get it right, but I think in this case at least they moved towards an appropriate decision. The second half of that class action case is about to be settled, we hope, for about $5 million.

I did give the clerk some copies of the judgment in the first case, which was Robertson v. Thomson. That was about $11 million, and it did take a dozen years to do.

Ms. Robertson and PWAC and other organizations that were supporting that suit identified the fact that publishers were using electronic rights without permission, so of course the contracts now try to take our rights in perpetuity, for all purposes, for anything that has ever been invented. It's obviously up to us to stiffen our spines as the small business people that we are.

There's an imbalance in the negotiating power. We work on that in various ways. We'll form a union if we have to, but we'd rather come to terms with our partners in the industry on reasonable terms. It's an ongoing issue; I don't think anything you can do here will change that appreciably, but certainly we need to have that fundamental recognition for digital or electronic copies of our works. We need to have our rights in those works recognized, and some aspects of this bill obviously put that at threat.

Mr. Charlie Angus: I remember when we paid freelancers, and our understanding was that we had first right to print. Whatever they did with it afterwards was their business. If they resold it to a magazine and got paid three times, that was fine. I'm not going to say who some of the large players were who were not passing on those rights, but did being part of a collective make it possible to defend the rights? I ask because an average writer or musician can't take on a very large corporate interest and still pay the bills. What's the role—

Mr. Alexander Crawley: The interesting thing with the collectives is that we sit around the table with publishers and Access Copyright. We're equally represented, creators and publishers, and it's in our joint interests, because it's about the secondary uses: it's about the copying of the works. It's not about the original terms of however we're engaged and provide our rights, or whatever contractual agreements we have; that's not the purview of this committee.

Actually we work together, and that has helped. When people come together and talk about all the issues that are affecting them, there's obviously a greater understanding on our side of the challenges that publishers are facing, and vice versa, so we're hoping that we're working toward a better partnership with publishers if we have the appropriate recognition of our joint rights as the creators and as the owners, as they're called.

I don't know if I answered your question.

Mr. Charlie Angus: I think it was clear that you organize yourselves in order to defend your terms of trade with the publishers. You work with the publishers to ensure a healthy market and you look for law to ensure that this market is not unfairly impacted by changes in how the distribution of your works is done. Those are the steps I'm trying to establish.

I want to get on to the issue of fair dealing and user-generated content, because we have heard time again and again that we should strike it from the bill, but our problem is that it's been defined by the Supreme Court. We've defined user rights. We've defined fair dealing. I think it is incumbent upon us as a committee to try to find how to address this aspect so that we have clarification.

I want to put two questions to both of you on this—

The Chair: Mr. Angus, you have about 15 seconds.

Mr. Charlie Angus: I have 15 seconds.

Does the Berne three-step test help us move towards a definition on fair dealing?

Ms. Hélène Messier: Yes, it does.

A voice: *Oui*.

Mr. Charlie Angus: Thank you.

The Chair: All right. Thank you very much.

Go ahead, Mr. Lake, for seven minutes.

Mr. Mike Lake (Edmonton—Mill Woods—Beaumont, CPC): Thank you, Mr. Chair.

I just want to clarify: all three of you are opposed to notice and notice in favour of notice and takedown. Is that fair?

Mr. Alexander Crawley: Yes. We'd go further if we could, but that would certainly be a step in the right direction.

Mr. Mike Lake: I always try to relate this to real-world situations. I think about people who might, for example, post a video of a child doing a dance routine or a gymnastics routine or something like that, and someone might have a concern about copyright there and send a notice. You would advocate that regardless of whether there's an actual infringement or not, if someone says that there is, automatically that video that someone is trying to share with their family should be taken down right away, immediately. It could be a kid reading a book on camera or something like that.

● (1240)

[*Translation*]

Ms. Hélène Messier: No, I can give you a specific example.

Two years ago, we used the U.S. notice and takedown procedure to shut down an Internet site. That Internet site was selling illegal reproductions of books for educational purposes. We did an investigation, prepared a file, signed a statement under oath, forwarded it to a U.S. Internet services provider and the site was shut down. So, we're not talking about minor use; we're talking about serious use, which had an impact on the rights of creators. The site was shut down on the basis of solid allegations, that were verified, and on a solid case that was substantiated. We're not talking about someone acting on a whim—if he gets up one morning and decides he is going to have a website shut down because he doesn't like it. We are mainly talking about the possibility of shutting down sites where it can be demonstrated that they have a serious negative impact. On the face of our own documents and by looking at the site, we knew that it was an illegal operation, and the site was shut down.

[*English*]

Mr. Mike Lake: That's fair. Everybody's on the same page as far as that kind of commercial infringement goes. Nobody opposes that, but notice and takedown would actually mean that if somebody did take issue with the video of the child reading a book or singing a song or doing a dance routine, it would automatically have to be taken down, whether there's an infringement proven or not, right? Am I correct?

Mr. Alexander Crawley: For our part, I think the graduated response is the thing. We don't want to go after widows and orphans. It's a culture that's not working. That approach is not working. However, as you've heard before at this committee, we need a test of what makes it an original work so that the definition would be clear for everyone who was using it—you know, the USG.

The other thing is that as we understand Bill C-32, Canada would be the only place in the world where a web service such as YouTube wouldn't have to pay anything to the owners or licensees.

Mr. Mike Lake: To be fair, we're talking about different issues here, because under notice and takedown, it wouldn't matter whether we had the definition you're talking about or not. There's no proof of infringement; you just ask for it to be taken down, and it has to be taken down regardless of whether there's infringement or not.

I would argue that under notice and notice, there is a graduated system. You send a notice, and the person who put on the clip in question, or whatever it is that's in question, gets that notice. They now are aware that someone thinks they may be infringing and they have a decision to make. If they make a decision to keep it up, then legal action can be taken.

We do live in a country where due process is important. I think this is an important question for most families, considering how they share their lives with their friends and the world in general in this new digital world we live in. I think they would have real concern with the fact that if someone says they're infringing, automatically they're assumed to be infringing, and something is ripped off the Internet.

[*Translation*]

Ms. Danièle Simpson: The person who receives the notice is not required to do anything. On the other hand, based on what you just said, if that person does nothing, the person who feels he or she has been adversely affected will have to go to court and launch a legal proceeding. We always come back to the same problem, which is that the injured party has to go to court, whereas if—

[*English*]

Mr. Mike Lake: No, excuse me. Just to correct the record, there is no proof of infringement or injury at that point. Someone says they've been infringed upon, but there's no proof they've been infringed upon, and they may not have been.

[*Translation*]

Ms. Danièle Simpson: In that case, the notice and takedown system should perhaps apply to cases where there is certainty. It's not just a matter of requesting the takedown and then having it take effect. That is not what we're asking for. We want to avoid a situation where the person whose actions have adversely affected the artist can continue what he is doing without there being any consequences, unless the artist takes legal action. That is the point we want to emphasize here.

Ms. Hélène Messier: In addition, the injured party will not tend to take legal action given that in cases involving non-commercial infringement, pre-set damages will be between $100 and $5,000. Who is going to launch a lawsuit in order to receive $100? Who?

● (1245)

[*English*]

Mr. Mike Lake: That's the point, though. We don't know whether the person's infringed. You can't live in a world where we automatically take things down. It doesn't work that way. It doesn't work that way in business cases. If you walk into a store and you feel that you weren't treated fairly, you can't shut the store down or tell them they have to stop selling a certain product. Here you just tell somebody, and automatically they have to stop doing it. There's a process in place, and why shouldn't it be the case here?

[*Translation*]

Ms. Hélène Messier: Do you really believe that creators and copyright owners have so much time on their hands that they will spend it sending out unnecessary notices? In my opinion, if they take the trouble to report a possible infringement, it's because they have serious suspicions. Furthermore, in order to use a work, you have to request the prior authorization of the rights holder. If the rights holder has not given his or her authorization, there almost certainly is infringement of copyright. People do not just get up one morning and decide to send out dozens of notices for no reason.

[*English*]

Mr. Mike Lake: Okay.

I want to talk a little bit about fair dealing for education, if I could, just to understand the position of Ms. Simpson. Obviously you're not in favour of it. What is the specific problem you're trying to address with the issue of fair dealing for education that isn't solved by the six factors that Supreme Court has determined?

[*Translation*]

Ms. Danièle Simpson: If fair dealing applies to an entire sector in society, I don't understand how you can think that will be easy to arrange. You are asking writers to provide the raw material used in education, and at the same time, you are saying to them that, if the educational institution can prove that it is dealing fairly, they will have to provide the fruits of their labour free of charge. A writer cannot possibly cope with that kind of situation. It's impossible.

[*English*]

Mr. Mike Lake: But that's not the way it works. The Supreme Court has the two-step test. The first step determines if it's fair dealing. If it is, then there are six factors they have to consider, one of which is the effect of the dealing on the work. Will the copying of the work affect the market for that work?

[*Translation*]

Ms. Danièle Simpson: All of that will be decided in court.

[*English*]

The Chair: Mr. Lake, that's going to have to be it.

We're going to move along to the Liberal Party.

Mr. Garneau, go ahead. You have five minutes.

[*Translation*]

Mr. Marc Garneau: Thank you very much, Mr. Chairman.

It was interesting to hear the discussion between Mr. Lake and the three witnesses. My conclusion is that you have a much better understanding of the legislation than does Mr. Lake when it comes to the notice-and-notice approach.

My first question is addressed to the witnesses involved in collective copyright administration, and specifically Ms. Messier, but the others should feel free to comment as well.

Those who believe that this exemption for education is not a problem often say that we are not talking about educators copying books in their entirety, because that would obviously not be acceptable. I would like to be given some idea of the statistics in that regard. When you collect money from educational institutions that use authors' works, what is most often involved: books in their entirety, excerpts or chapters? What is used more often? You can all respond.

Ms. Hélène Messier: The licenses we grant to primary and secondary schools, CEGEPs and universities never authorize the reproduction of a work in its entirety. In primary and secondary schools, they are authorized to copy the lesser of either 10% or 25 pages. As for universities and CEGEPs, they can photocopy and reproduce 10% of a work. They can also go so far as to reproduce an entire chapter or article, as long as it does not represent more than 20% of the collection. Those excerpts alone represent, just for Quebec, more than 168 million copies annually. These are copies that are reported to us. It is safe to assume that some of them are not. So, that represents the equivalent of 840,000 200-page books which are reproduced annually in Quebec educational institutions—and these are only excerpts.

[*English*]

Mr. Marc Garneau: *Merci.*

Mr. Crawley, did you want to add to that?

Mr. Alexander Crawley: It's very similar for Access Copyright. As affiliates, we can certainly make sure that they provide you with whatever statistics we have. There's a per student rate, which is currently $3.63, and then there's 10¢ a page thereafter for up to 10% of a work. If you need more than that, then you can negotiate a higher licence.

This is in the interest of publishers, obviously, as well as creators. If they could just go ahead and copy whatever they wanted to copy because they were educators, we'd lose our educational publishing industry. That's our fear.

● (1250)

[*Translation*]

Mr. Marc Garneau: Ms. Simpson, would you like to add something?

Ms. Danièle Simpson: No, that's fine.

Mr. Marc Garneau: Let's talk about the Berne Convention and the three tests that should enable us to determine whether something can be considered fair dealing. Do you think that some educational uses could be consistent with the provisions of the Berne Convention and apply in the present context? Or do you feel that nothing would be consistent with the Berne Convention in terms of educational uses?

Ms. Hélène Messier: Not at all. In European countries, the Berne Convention is strictly enforced and there are exceptions for educational purposes, particularly for the purposes of illustration in the educational context—in France, for example. Often, to ensure that these exceptions do not have an inordinate impact on creators, they may also include compensation, but they are carefully targeted to ensure there is no impact on the market.

In some countries, such as Australia, legal licensing allows the schools to access works on the Internet in exchange for compensation. Copibec has an agreement with the Australian society for exchanges of inventory: we administer the Australian inventory in Quebec and Copibec receives royalties for the reproduction of material on Quebec websites.

So, yes, there are exceptions. They have to be strictly defined and, in some cases, include compensation. It depends on the schools' requirements. I think that there should be exceptions under the Act when access to works is problematic. However, when there is no access problem, I see no reason to include an exception. The Copyright Act does not give users the right to exceptions. When there are exceptions, they reflect the rights of users, but not the contrary.

[*English*]

The Chair: Thank you, but we're going to have to move along.

[*Translation*]

Mr. Cardin, you have five minutes.

Mr. Serge Cardin (Sherbrooke, BQ): Thank you, Mr. Chairman.

Good afternoon to all our witnesses.

I would like to come back to the notice-and-notice system and the responsibility that should rest with Internet service providers. In this digital world, digital service providers must be involved. How can we force them to take their responsibilities? Is there a better system than the notice-and-notice system in the international community? What do you advocate in terms of making Internet service providers more accountable?

[*English*]

Mr. Alexander Crawley: I would just say, as one of the gentlemen over here pointed out earlier, that there's no perfect system. It's a moving target. However, I think that the safe harbour concept in this bill is basically letting the guys and gals who own the pipelines off the hook. It says they don't have any responsibility for what's flowing through their pipes, but they get to make most of the money from the flow. We'd like a much more significant partnership with the delivery system, since we are partners, although not equal partners.

I don't think there's a perfect system. Certainly there is a graduated response. Perhaps Mr. Lake's understanding of notice and takedown is different from ours, but there has to be a consequence. Right now, you can have a few people sending out a notice again and again, but individual creators can't afford to take every perceived infringer to court. That's not a practical solution.

[*Translation*]

Ms. Hélène Messier: I agree with Mr. Crawley that there is no perfect system. In my opinion, the fairest approach may be the flexible response system whereby people receive an initial notice letting them know that what they're doing may be an infringement of copyright. It also makes it possible to apply increasingly tough sanctions.

At the same time, I think we should also be looking at other options. Perhaps Internet service providers should also be participating in the funding of culture and creative work. There is a cable production fund. At present, people who host and supply bandwidth services are people who are making money. They are pocketing the highest profits in the entire industry, and I think they should be making a contribution. Without it becoming a license to justify illegal downloading, that money could be passed on to creators and copyright owners to help expand the legal supply of material on the Internet. I believe there are a number of potential solutions that could be explored.

● (1255)

Mr. Serge Cardin: Are these your own suggestions and recommendations or have you taken inspiration from best practices that are currently in use?

Other collective societies around the world must have looked at this. In that respect, can you tell us what the best practices are at this time and whether we should follow their example?

Ms. Hélène Messier: A number of different systems have been implemented. Flexible or graduated response is popular these days. Both in France and England, they have introduced a form of graduated response. The idea of setting up this kind of fund also comes from people in the music industry and the CAMI agency.

We could also develop something original. Accountability does not preclude contribution. At this point, however, I cannot provide you with a miracle solution. I don't have one, but I do think we have to move in the direction of greater accountability for Internet suppliers, including asking them to make a greater contribution.

Mr. Serge Cardin: So, you would all agree to have that included in the Act. This is something that should apply.

Do I have any time left, Mr. Chairman?

[*English*]

The Chair: You have 15 seconds.

[*Translation*]

Mr. Serge Cardin: One witness told us that copyright is not compensation, but rather, a reward.

Ms. Hélène Messier: Ah, ah!

Mr. Serge Cardin: If the bill, as currently worded, results in potential lawsuits that have been estimated at $74 million—some are even talking about losses of more than $100 million—does that mean that the government will be penalizing authors and creators by taking away their reward?

Ms. Danièle Simpson: How could writers—

[*English*]

The Chair: We're going to have to move to Mr. Del Mastro for five minutes.

[*Translation*]

Ms. Danièle Simpson: How could writers earn a living if they weren't paid?

[*English*]

The Chair: I'm sorry; we're moving on to Mr. Del Mastro.

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

Thank you to the witnesses today.

There has been a lot of talk about how artists or creators would have to spend all their time in court trying to defend their rights, but really the purpose of establishing statutory damages in the law—and I'm sure you have an understanding of statutory damages—is not actually having a burden of proof to show that you've suffered a monetary penalty. You don't have to quantify that, which in court is always, frankly, the most difficult thing to establish in this type of case. The fact that there are statutory damages put into this bill does provide protection and discourages people from infringing copyright.

You talked a little bit about some of the exceptions. I'm interested in getting your opinion on technical protection measures. You didn't touch on those, but I would like to know what your position is on them.

I'm also concerned that there is a misunderstanding that inserting education within fair dealing actually attacks the collective, which is not the case. In fact, as I have said many times to the committee, if you look at the ruling of the Supreme Court of Canada and then look at what was established in Berne, the bill is entirely consistent.

I would very much like, though, to get your opinion on technical protection measures.

Mr. Alexander Crawley: I did mention in the statement that for the individual creators we represent, we have no objection to the use of technical protection measures, but they don't give us what we need individually. As for the big corporate players and so on that think they can make a lock that nobody can pick, good luck; individual creators are finding much more innovative ways of getting to the market, and we will continue to do so if our right to fair compensation is well represented in this bill.

We don't object to the locks; I know that a lot of the so-called "copylefters" do. They don't think there should be any locks at all. Everything should be free if you own a phone. We're not there, but we don't think TPMs are the solution. They are not the single solution. They're not the solution for individual creators.

● (1300)

Mr. Dean Del Mastro: Thank you. I don't think everything should be free. People should be paid for what they do.

Go ahead.

[*Translation*]

Ms. Hélène Messier: I can tell you, Mr. Del Mastro, that as far as Quebec publishers are concerned, locks are not a solution. First of all, it is impossible to lock works published in hard copy. As for digital works, they have decided instead to use watermarks because they wanted a consumer-friendly solution that would make it possible to move from one platform to another. So, if you buy a book on the Kindle platform, you can also read it on another platform. Publishers wanted to respond to that consumer demand.

I don't agree with you that the Canadian legislation is consistent with our international obligations. And I am not the only one to be saying that. A number of people have testified to that effect in front of this committee. I am thinking of Ysolde Gendreau, Georges Azzaria, the Quebec Bar and a number of international associations. That is a lot of people who believe that this bill is not consistent with Canada's international obligations.

[*English*]

Mr. Dean Del Mastro: I've met with dozens and dozens—perhaps as many as 100—different legal experts on this bill, and I have as many as 100 different legal opinions on it, so I'm not surprised that some folks would come in and say that maybe it's not consistent, and then other people would come in and say it is absolutely consistent. Ultimately it was written largely or almost entirely by industry. Their legal experts have actually written the bill subject to those tests. We believe that legally it brings us up to our WIPO treaty requirements and is respectful of both the Supreme Court ruling and the Berne three-step test. That's the approach of the bill.

You actually outlined exactly where I think the government is going on TPMs, which I think is important. You talked about how the book industry, for example, has actually decided not to use locks. They've actually done that in the music industry with CDs as well. Consumers wouldn't accept them, so they don't use them. Other industries, such the movie industry, are now producing Blu-rays, and they are selling them with digital copy on them. Ultimately the market is going to drive whether locks are accepted or not and how businesses choose to use them, but that's what the bill respects.

Thank you very much for your time.

The Chair: That's going to have to be the last word, Mr. Del Mastro.

Thank you very much to our witnesses.

Mr. Alexander Crawley: I would love to have gotten in a word on statutory damages, but that will have to wait until next time.

The Chair: The meeting is adjourned.

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