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Cc: Sweet, David - M.P.; Masse, Brian - M.P.; Regan, Geoff - M.P.;
Lake, Mike - M.P.
Subject: Submission to INDU study on E-Commerce market in Canada.
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I hope the following is useful for your study.

My name is Russell McOrmond, and I make my living as a software author and systems administrator. I appeared before the Industry committee on May 4, 2004 while you were studying a bill that would regulate and possibly prohibit multi-purpose communications technology that could be abused to decode subscription television services. I appeared on March 8, 2011, before the Legislative committee on Bill C-32 to discuss the Paracopyright or "digital locks" provisions and how they may greatly harm law abiding technology owners.

My concern is that when the creation, import or usage of technology is regulated in the wrong laws, harmful unintended consequences will result. My intent is not to excuse people who may abuse multi-purpose technology, but to ensure that regulation narrowly targets harmful abuse and not the activities of law abiding technology owners.

We can see a potential inappropriate regulation in discussions around whether "paywalls" are the subject matter of copyright law. While Copyright law is not the only area of law where we see these types of problems, it is the most current given some of the members in this committee overlap with the committee that will be studying a copyright bill.

I am familiar with paywalls from the perspective of both a user and a provider of such services. I will offer two specific examples of paywalls to illustrate the issue.

I have been a paid subscriber to The Hill Times since 2005. This is an example of a service that offers some access to anonymous users browsing the Internet, as well as offering advanced services to paid subscribers. You use a simple username and password to log in to prove you are a subscriber and gain full access to search through considerable archives, access to all new articles, and so-on.

My current job is as a software author and system administrator for Canadiana.org. We offer anonymous access to some content, while other content is only available to paid subscribers. Nearly all the content we offer is in the public domain, so copyright isn't relevant to our service. What is being paid for is access to this content as a method to fund the work we do in digitizing and organizing this information. We have individual and institutional subscribers, with individual users able to subscribe quickly making use of a simple PayPal payment system.

While institutional subscribers are given access based on their internet address, individual subscribers use a simple username and password to indicate they are a subscriber.

These two services equally use a paywall to differentiate between anonymous access and subscribers. While The Hill Time is offering access to copyrighted works, Canadian.org is not. From a legal standpoint these paywalls should be treated the same, with each being offered the same level of legal protection against people who might want to gain unauthorized access to our services.

There has been suggestions from some people that paywalls are inadequately legally protected in Canada. This is often claimed by proponents of the beyond-WIPO Paracopyright provisions in Bill C-11. I don't know for certain whether paywalls are offered adequate legal protection under existing Canadian federal or provincial laws, including whether existing criminal code (section 342) is sufficient.

The Copyright Act is the wrong law to provide this legal protection. It would make very bad law if legal protection for a paywall was dependent on the specifics of what is offered behind the paywall rather than protecting all paywalls equally and fairly. While I agree with the suggestion that paywalls should be offered legal protection, it must be in the correct law.

While it is true that some copyright holders make use of paywalls in support of their businesses, it is also true that even more copyright holders use electricity in support of their businesses. Suggesting that legal protection for paywalls must be added to the Copyright Act makes about as much sense as suggesting that a national energy strategy must also be included in the Copyright Act.

The specific case of a paywall is not the only way that Bill C-11 is alleged to provide legal protection for activities that should be regulated under different federal and/or provincial laws.

When I appeared before the Bill C-32 legislative committee I used the example of a DVD and my mobile phone to discuss the 4 different classes of owners potentially impacted by that bill. The DVD represented the copyright holder and the possible "owner" of a physical copy, and the mobile phone represented the software author and the technology owner.

It is presumed that Bill C-11 will legally protect the encryption on the DVD, as a somehow copyright related access control. This encryption doesn't disable copying, which can be done without decrypting the content, but ties access to specific brands of technology that contain the decryption keys. This type of tied selling is more the subject matter of competition policy (specifically section 77) than copyright.

The contractual relationships between the largest studios and hardware manufacturers that make up the DVD Copy Control Association are the subject matter of contract and competition law, not copyright.

It is presumed that Bill C-11 will legally protect the encryption within mobile devices, video game consoles, and other digital technology which disallow their owners from making their own software choices. These digital locks transfer control of these technologies from the owners to a third party who holds the keys. This abuse of technology is more the subject matter of property law than copyright. It is ironic that at a time when we are spending considerable time discussing the mere registration of long-guns, that the same government is contemplating the legal protection of non-owner locks being placed on an ever increasing number of the digital technology we own.

While activities like the non-controversial use of paywalls should be protected in law, they should not be protected in copyright law. While amendments may be needed to other laws in order to offer appropriate legal protection, the amendment to Bill C-11 that would fix the worst problems of that bill is the same as what most stakeholders have been calling for. Any Paracopyright that is added to Canadian copyright law must be closely tied to otherwise copyright infringing activities. The further away from the traditional subject matter of copyright that these provisions stray, the more harmful unintended consequences will result.

Thank you.

Note: I work on Wellington St. near Parliament, and can be made available to members of the committee or the committee as a whole to answer any questions they may have.

Russell McOrmond