

BRIEF on Bill C-11



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Union des consommateurs is a member of Consumers International (CI), a federation composed of 234 members from 113 countries.

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UNION DES CONSOMMATEURS, *the strength of a network*

The Union des consommateurs (UC) is a not-for-profit organization comprising several family economics cooperative associations (ACEF), the Association des consommateurs pour la qualité dans la construction (ACQC) and individual members.

The UC's mission is to act as a consumer rights representative and advocate, with a focus on the interests of middle-income households. The UC's work is driven by the values that are dear to its members: solidarity, equity and social justice, and improving the economic, social, political and environmental circumstances of consumers' lives.

The UC's structure enables it to maintain a broad vision of consumer issues while developing significant expertise in specific areas, primarily through its research on emerging consumer problems; its province-wide initiatives are supported and validated by the grassroots work it does and its member associations' roots in their community.

The UC works primarily at the provincial level, representing the interests of consumers in a variety of political, regulatory and judicial forums and also to the general public. Some of its main areas of research, action and advocacy are family budgeting and debt, energy, telephone service, broadcasting, financial products and services, business practices and social and fiscal policy.

With markets becoming increasingly globalized, the UC works with a number of consumer groups in English Canada and abroad. It is a member of Consumers International (CI), a body recognized by the United Nations.

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(1) Technological protection measures

Clause 47 of Bill C-11 proposes to add a new section 41 to the *Copyright Act*, entitled “Technological Protection Measures and Rights Management Information”.

Technological protection measures are defined as meaning:

any effective technology, device or component that, in the ordinary course of its operation,

(a) controls access to a work, to a performer’s performance fixed in a sound recording or to a sound recording and whose use is authorized by the copyright owner; or

(b) restricts the doing — with respect to a work, to a performer’s performance fixed in a sound recording or to a sound recording — of any act referred to in section 3, 15 or 18 and any act for which remuneration is payable under section 19.¹

The same clause of the bill prohibits the circumvention of such technological protection measures (section 41.1(2) of the *Copyright Act*) and allows rights owners to bring action against infringers. The prohibition on circumventing technological protection measures also limits the exercise by users of the rights granted to them by the new exceptions introduced in the bill, such as the right of reproduction for private purposes or to record for later viewing.

We must deplore the inclusion of technologies that control access to a work in the definition of technological measures. The protected technological measures thus go well beyond the provisions of the World Intellectual Property Organization (WIPO) Treaties. Article 11 of the WIPO Copyright Treaty (WCT), entitled “Obligations concerning Technological Measures”, reads as follows:²

Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.³

¹ Bill C-11, clause 47 of [on line]

<http://www.parl.gc.ca/HousePublications/Publication.aspx?Docid=5144516&file=4>
(retrieved on October 4, 2011)

² Article 18 of the WIPO Performances and Phonographs Treaty (WPPT) contains a provision similar to Article 11 WCT. WIPO Performances and Phonograms Treaty. WIPO Performances and Phonograms Treaty [on line] http://www.wipo.int/treaties/en/ip/wppt/trtdocs_wo034.html (retrieved on January 13, 2011)

³ WIPO Copyright Treaty (WCT), Article 11 [on line]

http://www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html (retrieved on January 13, 2011)

By establishing legal protection for technological protection measures that control access to works, section 41 goes beyond mere protection of the rights of authors, by permitting authors and rights owners to use technological measures to limit the rights that the Act grants to users. The rights granted to authors, rights that the protection measures dealt with in the WIPO Treaties should contribute to protecting, are already provided in section 3 of the *Copyright Act*; at no point is the right to control access to the work identified as a right granted to authors. The only references in the *Copyright Act* to a right of access held by authors is found in sections 30.8 and 30.9, which deal with ephemeral recordings and authors' right to have access to undertakings' records. As Thomas Heide has correctly observed, neither the WIPO Treaties nor the Berne Convention grant authors this sort of right of access, nor do they grant a right to interfere in the rights of access granted to users.⁴

Access to the work is the right exercised by a user, for example after the performers and makers of the sound recording exercise their right to make it available, the right to make available itself being only one component of the right to the public.⁵ Accordingly, "a performer's copyright in the performer's performance consists of the sole right to do the following acts in relation to the performer's performance or any substantial part of it and to authorize any of those acts: ... (d) to make a sound recording of it available to the public by telecommunication in a way that allows a member of the public to have access to the sound recording from a place and at a time individually chosen by that member of the public and to communicate the sound recording to the public by telecommunication in that way",⁶ and the maker of a sound recording has a copyright that consists of the sole right, in relation to the sound recording or any substantial part of it, "... (1.1)(a) to make it available to the public by telecommunication in a way that allows a member of the public to have access to it from a place and at a time individually chosen by that member of the public and to communicate it to the public by telecommunication in that way".⁷

Based on these sections concerning the right to make available by telecommunication, we would say that the bill is incoherent. The exercise by the owner of the right to make available by telecommunication gives users a right of access to works, which right of access becomes illusory, and may be denied to the user, if the copyright owner puts in place technological protection measures that control access to the works and restrict or prevent the exercise of the right of access.

⁴ HEIDE Thomas, "Copyright in the E.U. and United States: What 'Access Right'?" (2001) E.I.P.R. 469, 470. "Does copyright provide a 'right against the gaining of unauthorised access' to copyrighted works, a right which would give rise to a power to control access to such works if it could be said to exist? To be sure, neither the WIPO Copyright treaty nor the Berne Convention explicitly articulate such right. It is instantly observable that there is no 'right against the gaining of unauthorised access' to a copyrighted work."

⁵ REINBOTHE Jörg, and Silke Von LEWINSKI, *The WIPO Treaties 1996*, Butterworths Canada Ltd, Markham, Ontario, 2002 p. 103: "... the making available right was considered to be an aspect of the communication right"

⁶ Clause 9(1) of Bill C-11, [on line]

<http://www.parl.gc.ca/HousePublications/Publication.aspx?Docid=5144516&file=4>
(retrieved on October 4, 2011)

⁷ Clause 11(1) of Bill C-11, [on line]

<http://www.parl.gc.ca/HousePublications/Publication.aspx?Docid=5144516&file=4>
(retrieved on October 4, 2011)

Article 11 of the WCT, which contains no definition of “effective technological measures”, therefore allows the member states great flexibility in incorporating these measures, as Reinbothe and Von Lewinski point out: “Contracting Parties’ legislators have a wide range of flexibility for implementing the obligations under Article 11 WCT”;⁸ however, they qualify this: “At the same time, Article 11 WCT does give some guidance and indicates the limits to such flexibility.”⁹

The WCT does provides only the minimum obligation that there be adequate legal protection, and so it is up to states to establish the type of technological measures in question and the protection they intend to provide for those technological protection measures. Séverine Dusollier is of the same opinion:

[TRANSLATION] It is apparent from these discussions that this formulation, and in particular the criterion of adequate protection, is intended to make protection of technological measures subject to the general scheme of copyright, and is an attempt to achieve a balance between the interests involved. It is therefore no longer a matter of specific protection, but a simple obligation to protect the technological measures, it being up to each national legislature to determine the adequate extent and content.¹⁰

Since 1996, the year when the WCT and WPPT were adopted, many countries have ratified them. For example, in its *Digital Millennium Copyright Act*, the United States introduced chapter 12 into its copyright law relating to technological protection measures. Section 1201(a) states: “No person shall circumvent a technological measure that effectively control access to a work protected under this title.”¹¹ In addition there is the definition of the effectiveness of a technological measure: “a technological measure ‘effectively controls access to a work’ if the measure, in the ordinary course of its operation, requires the application of information, or a process or a treatment, with the authority of the copyright owner, to gain access to the work.”¹²

Evidently, the approach taken by the American legislation, on which the measures proposed in the Canadian bill seem to be modeled, focuses on technological protection measures that control access to the work. This is particularly true in that the prohibition on circumventing technological protection measures applies only to measures that control access.¹³ It is important to note that the American law is not built on the same model as the Canadian legislation and, for

⁸ REINBOTHE Jörg, and Silke Von LEWINSKI, *The WIPO Treaties*, 1996, Butterworths Canada Ltd, Markham, Ontario, 2002 p. 142

⁹ *Ibid.*

¹⁰ DUSOLLIER Séverine, *Droit d’auteur et protection des œuvres dans l’univers numérique*, Larcier, Brussels, 2007 p. 89

¹¹ Copyright Law of the United States and related Laws contained in Title 17 of the United States Code, [on line] <http://www.copyright.gov/title17/> (retrieved on January 21, 2011)

¹² *Ibid.*

¹³ Section 41.1 of the *Copyright Act*:

41.1(1) No person shall:

(a) circumvent a technological protection measure within the meaning of paragraph (a) of the definition “technological protection measure” in section 41; ...

example, does not incorporate a right to make available, for rights owners.¹⁴ It is therefore important to be very cautious in seeking to import measures modeled on the American legislation into Canadian law.

Directive 2001/29/CE of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, O.J.E.C., 22 June 2001, L 167/10, referred to as the Information Society Directive (the "Directive"), takes a more neutral approach to technological protection measures and does not essentially focus on measures that control access to works. Article 6(1) of the Directive states: "Member States shall provide adequate legal protection against the circumvention of any effective technological measures, which the person concerned carries out in the knowledge, or with reasonable grounds to know, that he or she is pursuing that objective."¹⁵ A technological measure is defined as follows:

any technology, device or component that, in the normal course of its operation, is designed to prevent or restrict acts, in respect of works or other subject-matter, which are not authorised by the rightholder of any copyright or any right related to copyright as provided for by law or the *sui generis* right provided for in Chapter III of Directive 96/9/EC. Technological measures shall be deemed "effective" where the use of a protected work or other subject-matter is controlled by the rightholders through application of an access control or protection process, such as encryption, scrambling or other transformation of the work or other subject-matter or a copy control mechanism, which achieves the protection objective..¹⁶

Apart from the fact that this provision relates only to protection measures designed to ensure the exercise of rights already granted to the copyright owner, it is interesting to note that the Directive is careful to define the concept of effectiveness, which is an essential prerequisite for the prohibition on circumventing technological protection measures. Only technological measures that are effective in achieving the protection objective referred to in this article (that is, protection of existing rights of rightholders) are protected. That definition of effectiveness is absent in Bill C-11, and so the proposed provision opens the door to disputes concerning the interpretation of the term "effective" which is used but not defined in the definition of technological protection measures.¹⁷ Such disputes would obviously raise the question of how protection measures that are effective in terms of the purposes intended by the person who uses them, but are not intended solely to protect a right granted to the right owner by the Act, should be treated.

¹⁴ Sydnor, Thomas D., 2009 "The Making-Available Right Under U.S. Law", Progress & Freedom Foundation Progress on Point Paper, Vol. 16, No. 7, March 2009. [on line]: <http://ssrn.com/abstract=1367886> (retrieved on January 27, 2011)

¹⁵ Directive 2001/29/CE of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society

¹⁶ *Ibid.*

¹⁷ Section 41 of the *Copyright Act* as proposed by clause 47 of Bill C-11.

As we have seen, the member states have some flexibility in incorporating the provisions of the Directive into their national law. To that end, Sweden, which has also ratified the WCT and WPPT, has enacted section 52 of its copyright law respecting literary and artistic works (the Swedish Copyright Act):

The expression “Technological measure” as used in this Chapter, means any effective technology, device or component designed to prevent or restrict, in the normal course of its operation, the reproduction or the making available to the public of a copyright-protected work without the consent of the author or his successor in title. ... It is prohibited to circumvent, without the consent of the author or his successor in title, any digital or analogue lock which prevents or limits the making of copies of a work protected by copyright, to circumvent a technological process, such as encryption, that prevents or limits the making available to the public of a work protected by copyright, or to circumvent any other technological measure that prevents or limits such acts of making available.¹⁸

The technological measures to which the Swedish Copyright Act relates are, in accordance with the provisions of both the WIPO Treaty and the Directive, solely those measures that protect existing rights, that is, the right of reproduction and the right to make available. It is therefore not a matter of protecting technological protection measures that control access to works.

Rather, Sweden intends to ensure that the right of access granted to users is also well protected. The second paragraph of section 52 of the Swedish Copyright Act provides that the prohibition on circumventing technological protection measures does not apply to users who have legal access to the works, who are therefore permitted to circumvent the technological protection measures.¹⁹

Unfortunately, Bill C-11 does not contain any provision to that effect. The absence of such a clarification is regrettable, when we consider the kinds of problems that certain technological protection measures present for a user. For example, certain protection measures prevent reading music CDs on computers, to prevent the content from being copied, while the right of access granted to the user should logically include the user's right to access the work on any compatible device. The type of device that the consumer might choose to use is obviously not covered by the rights granted by the Act to copyright owners. Other technological protection measures also prevent reading DVDs on laptop computers, and still others make it impossible to read DVDs purchased in Europe on a Canadian DVD reader. These are just a few examples.

We also believe that Canada should model its legislation heavily on the approach adopted by the Swedish Copyright Act, given that by protecting the existing rights of both rights owners and the public it preserves the balance that Canadian copyright legislation should absolutely aim to preserve.

¹⁸ Act on Copyright in literary and artistic Works (Act 1960:729, of December 30, 1960, as amended up to April 1, 2009)

¹⁹ *Ibid.*, article 52d) Act on Copyright in literary and artistic Works: “The provisions of the first Paragraph do not apply when someone, who in a lawful way has access to a copy of a work protected by copyright, circumvents a technological measure in order to be able to watch or listen to the work.”

It will be noted that a not insignificant number of countries that have signed and ratified the WCT and WPPT have not incorporated protection in their legislation for technological measures whose purpose is to control access to works, and rather have simply recognized technological measures that protect existing rights. For example, Japan's legislation provides:

“technological protection measures” means measures to prevent or deter such acts as constitute infringements on moral rights of authors or copyright mentioned in Article 17, paragraph (1) or moral rights of performers mentioned in Articles 89, paragraph (1) or neighboring rights mentioned in Article 89, paragraph (6) (hereinafter in this item referred to as "copyright, etc.") ("deter" means to deter such acts as constitute infringements on copyright, etc. by causing considerable obstruction to the results of such acts; the same shall apply in Article 30, paragraph (1), item (ii) by electronic or magnetic means or by other means not perceivable by human perception (in next item referred to as "electromagnetic means"), excluding such measures as used not at the will of the owner of copyright, etc., which adopt means of recording in a memory or transmitting such signals as having specific effects on machines used for the exploitation of works, performances, phonograms, broadcasts or wire diffusions (in next item referred to as "works, etc.") ("exploitation" includes acts which would constitute infringements on moral rights of authors of performers if done without the consent of the author or the performer), together with works, performances, phonograms, or sounds or images of broadcasts or wire diffusions.²⁰

The Copyright Act of Slovakia also does not mention technological measures that protect access to works. Section 59(2) provides: “Technological measure pursuant to par. 1 shall mean any procedure, product or component integrated into a procedure, product or device designed to avoid, limit or prevent infringement of copyright in a work.”²¹ In addition to Sweden, Slovakia and Japan, the list might also include countries that, while protecting technological protection measures, have been careful to preserve the balance between the rights of rights owners and the rights of users: Finland, Denmark, Mexico, and China, some of those countries being among Canada's biggest trading partners.²²

It is important to note that attaching protection for technological protection measures that control access to the effectiveness criterion for technological protection measures provided in the Treaties has been strongly questioned. On that point, regarding the absence of a definition of the effectiveness criterion, Séverine Dusollier states: [TRANSLATION] “The protection for technological measures put in place by the international instrument relates only to tools that meet the effectiveness criterion, although that criterion is not defined by the treaties.”²³ While the WIPO Treaty does not require that the contracting parties address technological protection measures that control access to works, some thing that the Treaty must be interpreted as

²⁰ Copyright Law of Japan, Article 2 (xx), [on line], http://www.cric.or.jp/cric_e/clj/cl1.html#cl1+S1 (retrieved on January 26, 2011)

²¹ Copyright, Act No. 618, as amended, 2008 [on line] http://www.wipo.int/wipolex/en/text.jsp?file_id=189475 (retrieved on January 11, 2010)

²² Government of Canada, “Balanced Copyright”, [on line] http://www.ic.gc.ca/eic/site/crp-prda.nsf/eng/h_rp01153.html (retrieved on January 11, 2011)

²³ DUSOLLIER Séverine, *Droit d'auteur et protection des œuvres dans l'univers numérique*, Larcier, Brussels, 2007, p. 137

including them, since that is what the American legislation has done. Séverine Dusollier rightly refutes that interpretation: [TRANSLATION] “a commentator on the treaties (Ficsor, p. 545, C11.04) finds the interpretation of the concept in the provisions of the American DMCA. That method of interpretation, citing a subsequent instrument enacted by a different legislative body, seems to us to be incorrect.”²⁴

Some authors hold that it is essential to take technological measures that protect access to works into consideration in order to comply with the requirements of the WCT and the WPPT.²⁵

As noted earlier, the WCT and WPPT do not expressly cover technological protection measures that protect access to works, and refer only to those “that are used by authors in connection with the exercise of their rights.” Some European countries that have ratified the WCT and WPPT and the Directive have chosen not to include measures that protect access to works among technological protection measures that it is prohibited to circumvent; it is therefore entirely possible to ratify the WCT and WPPT without including technological protection measures that control access to works.

In her reference work on copyright and the protection of works in the digital age, Séverine Dusollier states, in relation to the Information Society Directive:

[TRANSLATION] The mere acts of receiving and using the work, and in particular accessing it, may now, by the operation of mechanisms subordinating access to the work and by the legal protection of those mechanisms, be subject to control by the rights owner. That advance in literary and artistic property into the area of access and use of the work defeats the essential principle of the independence of the work from its support. While access to the work is a prerogative normally reserved for the physical owner of the support of the work, or the supplier of the service relating to the work, the fact that the copyright covers the technological device relating to that access clouds the issue by straying from the notion of public exploitation of works, which theoretically defines the extent of the reservation granted in the work.²⁶

A consumer who procures a copy of a work in a store, subsequent to the exercise by the rights owner of their existing rights, that is, to make available or to distribute, expects to be able to access the work, without difficulty, since [TRANSLATION] “access to the work is a prerogative normally reserved for the physical owner of the support of the work.”²⁷ This desire for excessive control has a perverse effect: today, technological protection measures have reached such a level in the desire to control access to works that a consumer often turns away from works they might otherwise have procured legally. Ironically, copyright owners are actually prompting consumers to try to procure works from unauthorized sources that they would have been prepared to acquire by the traditional routes, which they will steer clear of because of the

²⁴ *Ibid.*

²⁵ Ficsor, Mihály, “Legends and reality about the 1996 WIPO Treaties in the light of certain comments on Bill C-32” [on line] <http://www.iposgoode.ca/wp-content/uploads/2010/Ficsor-Legends-and-Reality-about-the-1996-WIPO-Treaties-C-32-and-TPMs.pdf> (retrieved on January 10, 2011)

²⁶ DUSOLLIER Séverine, *Droit d’auteur et protection des œuvres dans l’univers numérique*, Brussels, Larcier, 2007, p. 581

²⁷ *Ibid.*

excessive restrictions imposed on them. The case of the video game “Spore” is a perfect illustration of this situation – the technological protection measures seriously affected sales of the game. To play that video game, a consumer actually had to have an Internet connection and activate an account on line. This meant that the consumer had to be continually connected to the Internet in order to play.²⁸ Outraged by these excessive technological protection measures, consumers turned to “alternative” sources to procure the work in a format that was not armed with those protection measures.²⁹ The game’s publisher subsequently decided to eliminate the technological protection measures and offer the game as a download from the Internet.³⁰

Some think that technological protection measures that control access by the user to downloading platforms, which they say are necessary because they support business models, must be protected in the *Copyright Act*.³¹ The reply is that it is not the purpose of the *Copyright Act* to protect business models; rather, it is to grant authors certain rights and obligations while ensuring a balance between those rights and the rights of the public. In our submission, protecting technological measures that control access is not the job of the *Copyright Act*, since the business models in question relate to the performance of a service, and not to copyright.

As Séverine Dusollier rightly observed: [TRANSLATION] “Providing access to the work, by authorizing limited use, making the work available to the public and allowing it to be downloaded are all in the nature of the performance of services.”³² She refers to cinematographic projections as an example:

[TRANSLATION] ... the act of publicly projecting a film is an act of communication for which the exploiter must have the author’s authorization, while the act of controlling access by persons in its place of exploitation relates solely to the conditions on which the services it offers to the public are performed. The provision of access is not an act subject to the author’s monopoly; it relates solely to the performance of services or, where applicable, the exercise of a right of ownership in the support.³³

²⁸ CHAMPEAU Guillaume, “Spore lapidé à cause de ses DRM”, [on line] <http://www.numerama.com/magazine/10584-spore-lapide-a-cause-de-ses-drm.html> (retrieved on January 11, 2011)

²⁹ Fabien H., “Spore: le piratage bat son plein depuis son lancement” [on line] <http://www.generation-nt.com/spore-piratage-drm-telechargement-actualite-152821.html> (retrieved on January 11, 2011)

³⁰ “EA commercialise Spore sans DRM” [on line] <http://www.cnetfrance.fr/news/ea-commercialise-spore-sans-drm-39385763.htm> (retrieved on January 11, 2011)

³¹ SOOKMAN Barry, “An FAQ on TPMs, Copyright and Bill C-32” [on line] <http://www.barrysookman.com/2010/12/14/an-faq-on-tpms-copyright-and-bill-c-32/> (retrieved on January 11, 2011); GANNON James, “TPMs: A comprehensive guide for Canadian copyright law” [on line] <http://jamesgannon.ca/category/2010-copyright-bill/> (retrieved on January 11, 2011)

³² DUSOLLIER Séverine, *Droit d’auteur et protection des œuvres dans l’univers numérique*, Brussels, Larcier, 2007, p. 398

³³ *Ibid.*

It is therefore important not to give in to what seems to be the intentional confusion harboured by certain rights owners. Unauthorized or fraudulent access to such services is already penalized by the law, for example under the relevant provisions of the *Criminal Code*. Let us not try to make the *Copyright Act* a catch-all that would try to protect all interests of businesses that, in one way or another, deal in goods or services in relation to works in which copyright might exist.

Proposed amendment

We propose that clause 47 of Bill C-11 relating to the definition of technological protection measures be amended by deleting point (a) in that clause and amending point (b).

As amended, that portion of the clause would then read as follows:

“technological protection measure” means any effective technology, device or component implemented by copyright owners in the exercise of their rights under this Act that, in the ordinary course of its operation, restricts the doing — with respect to a work — of any act referred to in section 3, 15 or 18.

With respect to the effectiveness criterion, we submit that the meaning given to that term by Reinbothe and Von Lewinski should be adopted in the bill. They state:

Technological measures, which do not function properly or which interfere with the normal functioning of the equipment or services, the use of which they are intended to apply to and to control, do not qualify for protection under Article 11 WCT. If, for example, a copy control mechanism interferes with the playability of a television or a VCR, it is not protected against circumvention or abuse.³⁴

As well, a definition of “effectiveness” should be incorporated in the bill, as both Reinbothe and Von Lewinski and Séverine Dusollier propose.³⁵ That definition would read as follows:

a technological protection measure that prevents the operation or interferes with the normal activity of reading equipment or services or with a lawful use of works shall be deemed not to be effective.

This definition of technological protection measures would comply with the requirements in the international WIPO Treaties, would be limited to technological protection measures that relate to the exercise of copyright and would preserve the necessary balance between the rights of copyright owners and the rights of users.

³⁴ REINBOTHE Jörg, and Silke Von LEWINSKI, *The WIPO Treaties 1996*, Butterworths Canada Ltd, Markham, Ontario, 2002 p. 145

³⁵ DUSOLLIER Séverine, *Droit d’auteur et protection des œuvres dans l’univers numérique*, Brussels, Larcier, 2007, p. 138

[note that the English version of proposed s. 41 does not contain an equivalent of the word “*efficacement*” in the French version of paragraphs (a) and (b) of the definition of “technological protection measure” – Tr.]

(2) New exceptions to copyright for the benefit of users

Bill C-11 introduces new exceptions for the benefit of users, entitled “non-commercial user-generated content”,³⁶ “reproduction for private purposes”³⁷ and “reproduction for later listening or viewing.”³⁸

These new exceptions, which grant users certain new rights, are welcome, and this initiative is particularly significant in that the new exceptions legalize practices that are widespread among consumers and supported by the market, which has for a long time offered some of the tools that allow or facilitate those practices.

However, in our submission, the provisions that introduce those exceptions need to be amended; some of the conditions attached to the exercise or regulation of the exceptions could very well turn out to be inapplicable, or seem not to hit the target at which they should be aiming. As well, some of the limitations placed on the exercise of these rights do not seem to be justified. Moreover, the wording of these sections does not always seem to be the best way of enabling users to know clearly and understand the nature, scope and limits of the rights they are granted.

(a) “Non-commercial user-generated content”

Clause 22 of Bill C-11, which proposes to add section 29.21 to the *Copyright Act*, introduces a new exception to copyright relating to non-commercial user-generated content. That provision reads as follows:

(1) It is not an infringement of copyright for an individual to use an existing work or other subject-matter or copy of one, which has been published or otherwise made available to the public, in the creation of a new work or other subject-matter in which copyright subsists and for the individual — or, with the individual’s authorization, a member of their household — to use the new work or other subject-matter or to authorize an intermediary to disseminate it, if

³⁶ Clause 22 of Bill C-11 proposing to add section 29.21 to the *Copyright Act*, [on line] <http://www.parl.gc.ca/HousePublications/Publication.aspx?Docid=5144516&file=4> (retrieved on October 4, 2011).

³⁷ Clause 22 of Bill C-11 proposing to add section 29.22 to the *Copyright Act*, [on line] <http://www.parl.gc.ca/HousePublications/Publication.aspx?Docid=5144516&file=4> (retrieved on October 4, 2011).

³⁸ Clause 22 of Bill C-11 proposing to add section 29.23 to the *Copyright Act*, [on line] <http://www.parl.gc.ca/HousePublications/Publication.aspx?Docid=5144516&file=4> (retrieved on October 4, 2011).

(a) the use of, or the authorization to disseminate, the new work or other subject-matter is done solely for non-commercial purposes;

(b) the source — and, if given in the source, the name of the author, performer, maker or broadcaster — of the existing work or other subject-matter or copy of it are mentioned, if it is reasonable in the circumstances to do so;

(c) the individual had reasonable grounds to believe that the existing work or other subject-matter or copy of it, as the case may be, was not infringing copyright; and

(d) the use of, or the authorization to disseminate, the new work or other subject-matter does not have a substantial adverse effect, financial or otherwise, on the exploitation or potential exploitation of the existing work or other subject-matter — or copy of it — or on an existing or potential market for it, including that the new work or other subject-matter is not a substitute for the existing one.³⁹

We submit that the wording of the exceptions should allow users to easily understand the scope of the rights they are granted and also to know as precisely as possible the framework within which they may benefit from the exercise of those exceptions to copyright. If the intent of enacting these new provisions is to regularize practices engaged in by users, it would seem to us to be important to also ensure that the wording is itself standardized, however slightly, to ensure that users clearly understand the framework for the exceptions. If users enjoy certainty that what they are doing is entirely legal, this will lead to greater legal security, and a clear framework will enable them to identify the point at which they are going beyond the scope of the rights they are granted.

We will focus here on some of the problems we see in the exceptions as they are worded.

Paragraph (a) of new section 29.21 precludes the application of this exception to any commercial exploitation of the new work created by the user. If it is exploited commercially or if the user authorizes a commercial exploitation of the new work, the use of the source work will be considered to be made in violation of the copyright. This new exception has been described as the “YouTube exception”. However, YouTube is not a not-for-profit organization; it is a commercial undertaking. It must be noted that content generated by users is exploited commercially by the Google company, since that site displays advertising banners on the pages where the user-generated content is disseminated. As well, this section, as it is worded, would not allow a user who intends to rely on the exception to authorize YouTube to disseminate the new content they had generated.

Paragraph (b) then creates an exception to the recognition of the authors’ moral rights,⁴⁰ since the obligation imposed on a user who generates content from another work to give the name of

³⁹ Clause 22 of Bill C-11 proposing to add section 29.21 to the *Copyright Act*, [on line] <http://www.parl.gc.ca/HousePublications/Publication.aspx?Docid=5144516&file=4> (retrieved on October 4, 2011).

⁴⁰ *Copyright Act*, R.S.C. 1985, c. C-42, section 14.1: “The author of a work has, subject to section 28.2, the right to the integrity of the work and, in connection with an act mentioned in section 3, the right, where reasonable in the circumstances, to be associated with the work as its author by name or under a pseudonym and the right to remain anonymous.”

the creator of the original work is very limited, and the author's right to paternity of the original work thus becomes secondary. While the justification for the infringement of moral rights in this context seems obvious, nonetheless the balance is disturbed and it would be wise to attempt to minimize the infringement of moral rights in so far as possible.

While, in the context of this exception, the Act cannot reasonably impose a greater constraint on a user than what is provided there, wider use of "creative commons" licences might remedy this flaw. It would be in creators' interests to adopt creative commons-type licences, which would not only permit alteration of works, but also guarantee the right to paternity.⁴¹

Proposed amendment

Allowing users to generate content and create new works based on existing works is desirable, as is legalizing a practice that is commonplace, provided that the rights of creators are not jeopardized. Providing that this right to create a new work based on an existing work may be exercised only if it "does not have a substantial adverse effect, financial or otherwise, on the exploitation of the existing work or other subject matter — or copy of it — ... including that the new work or other subject-matter is not a substitute for the existing one" seems to us to preserve balanced protection in this regard.

To resolve the uncertainties that the wording of the existing proposal relating to user-generated content would produce, we propose an amendment to this clause so that it would read as follows:

- (1) It is not an infringement of copyright for an individual to use an existing work or other subject-matter or copy of one, which has been published or otherwise made available to the public, in the creation of a new work or other subject-matter in which copyright subsists and for the individual — or, with the individual's authorization, a member of their household — to use the new work or other subject-matter or to authorize an intermediary to disseminate it, if**
- (a) the use of the new work or other subject-matter is done by the user solely for non-commercial purposes, and the authorization given by the user to a third party to use the new work prohibits the direct commercial exploitation of the new work;**
- (b) if it is possible in the circumstances, the source of the existing work or other subject-matter or copy of it and, if given in the source, the name of the author, performer, maker or broadcaster, are mentioned; and**

⁴¹ We are thinking here of a solution similar to the one proposed for the reproduction of written works: collective management of reproduction rights by copyright owners, to which we will return later.

- (c) the use of, or the authorization to disseminate, the new work or other subject-matter does not have a substantial adverse effect, financial or otherwise, on the exploitation or potential exploitation of the existing work or other subject-matter — or copy of it — or on an existing or potential market for it, including that the new work or other subject-matter is not a substitute for the existing one.**

(b) Reproduction for private purposes

Clause 22 of Bill C-11 introduces a new section 29.22 into the *Copyright Act*, which institutes a new exception to the sole rights of authors. This exception would allow users to make reproductions of works of which they possess a copy. While the exception is desirable, the conditions to which it is subject are unfortunately extremely restricted and are not such as would allow the exception to achieve the actual benefits that should reasonably result from it.

While a user may not circumvent the technological protection measures (as provided in paragraph (c) of proposed section 29.22), the right of reproduction for private purposes might very well be applicable only at the whim of rights owners; they would need only use a protection measure to prohibit the exercise by users of a right granted to them by the Act.⁴² In seeking to strike the balance that must be a constant concern in copyright matters, the rights granted to rights owners must not operate to enable them to unduly restrict the rights granted to users. The Supreme Court commented on this as follows in the *Euroexcellence* case: “Similarly, once copyright is granted in a given work, the protection that it provides must not be extended beyond its natural limits, and must take proper account of user rights”⁴³

To ensure that the private copying right granted to users is put into effect, we therefore propose that the prohibition on circumventing protection measures not be an obstacle to it.

As it is worded, this private copying right seems to be difficult to exercise in actuality, to say the least; the first paragraph authorizes the act that consists of making a reproduction, subject to certain conditions. A user can verify that certain conditions have been met at the time of the act (for example, ownership of the copy of the work) and thus know the limits of their right; certain other conditions, which relate to facts that can be verified only after the act authorized (for example, not giving the reproduction away, or the prohibition on transferring the copy of the work that was used to make the reproduction without first destroying all reproductions) are intended to prohibit an act (reproduction) that was permitted at the time when it will necessarily have occurred. Apart from the obvious enforcement problems presented by these conditions (if only in terms of verification), this approach, the *a posteriori* prohibition on doing something that was authorized at the time it was done, is not such as will enable users to clearly understand the scope of the rights granted to them and effectively regularize the public’s behaviour in relation to private copying.

⁴² In *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 S.C.R. 339 at para. 48, the Supreme Court of Canada recognized that the “exceptions” are rights granted to users: “The fair dealing exception, like other exceptions in the *Copyright Act*, is a user’s right.”

⁴³ *Euro-Excellence Inc. v. Kraft Canada Inc.*, 2007 SCC 37

With respect to the terms used in this section, we would also note that the reproductions it permits, which are already common practice, are commonly called “copies” (rather than “reproductions”) by everyone involved (users and copyright owners both). By calling the original that will be used to make a reproduction a “copy” in this section (for example, in paragraph (1)(a): “the individual legally obtained the copy), the wording of the provision is very likely to generate confusion.

From the standpoint of simplification, to enable everyone to better understand what is permitted and what the limits of these authorizations are, it further seems to us that a more broadly worded exception could include, in a single section, the exception introduced in section 29.23, the right to fix signals and record programs for later listening or viewing and the private copying exception,⁴⁴ and also the backup copy introduced by Bill C-11. In our view, instituting a single scheme for the reproduction of works,⁴⁵ providing for adequate royalties, would in fact be possible, and preferable. A scheme of that nature, that would ideally be technologically neutral, would have the dual advantage of enabling all creators whose works are copied to be remunerated and ensuring that users did not continue to live in a legal grey area, wondering whether copying this work or that work on one of their devices is or is not authorized by the copyright owner or the Act.

Ideally, and to comply with the requirements of the WIPO Treaties, that exception for reproduction for private purposes should therefore be combined with a system that allows for remuneration of creators, like the one defined in Part VIII of the *Copyright Act*. On that point, we would like to note what Canadian parliamentarians suggested as early as the 1980s:

[TRANSLATION] Observing that there is no agreement as to the extent of the economic harm caused by the home recording phenomenon, a majority of the members of the Subcommittee concluded that regardless of the extent of the damage caused, the practice was nonetheless an unauthorized reproduction of a copyright work, for which the copyright owners received no compensation. The Subcommittee was of the opinion that a levy scheme had to be instituted. It therefore rejected the solution that consisted of simply exempting home recording from the Copyright Act; instead, it advocated creating a compensation scheme in exchange for which home recording would be legalized.⁴⁶

⁴⁴ [TRANSLATION] “To summarize, in order to solve the problem of home recording, a majority of members of the Subcommittee recommended a solution similar to the one that was proposed for the reproduction of written works: collective management of reproduction rights by copyright owners, subject only to approval by of disputed tariffs by a reorganized Copyright Commission.” HÉBERT Monique, “Copyright Act Reform”, Current Issue Review, Library of Parliament, October 25, 1982, revised January 9, 1990, p. 16

⁴⁵ We would note that literary works may also be reproduced.

⁴⁶ HÉBERT Monique, “Copyright Act Reform”, Current Issue Review, Library of Parliament, October 25, 1982, revised January 9, 1990, p. 14

The Subcommittee added:

[TRANSLATION] ... a majority of members of the Subcommittee recommended that levies be collected both on devices and on sound and video recording supports; that solution is the one that best adheres to the principle of tying responsibility to the reproduction of the work, and it takes into account the rapid changes in the technology, which could very well, for example, make tape recording outmoded.

To summarize, in order to solve the problem of home recording, a majority of members of the Subcommittee recommended a solution similar to the one that was proposed for the reproduction of written works: collective management of reproduction rights by copyright owners, subject only to approval by of disputed tariffs by a reorganized Copyright Commission.⁴⁷

As well, if we believe, given that the practice is widespread and the Act must ensure that it is regularized, that recognition and regulation of this private copying right are essential, we further propose that Bill C-11 be amended to incorporate a measure for remuneration of copyright owners: the imposition of levies on supports and devices used for reproducing works. That measure would take into account the practices engaged in by consumers, who copy works on various supports or devices.

We submit that in addition to ensuring a better balance between the rights of users and of creators, establishing a generalized levy scheme applicable to private copying would also be more prudent: in a right such as the right of reproduction for private purposes were instituted without remuneration for creators, we believe that Canada could run the risk of legal action before the World Trade Organization.

(c) Risk of legal action against Canada

We believe that the right of reproduction for private purpose, without remuneration for creators, would be contrary to the obligations set out in the international Treaties and would expose Canada to legal action before certain international organizations such as the World Trade Organization.

Article 10 of the WCT sets out the rules governing the introduction of new limitations or exceptions to authors' rights:

(1) Contracting Parties may, in their national legislation, provide for limitations of or exceptions to the rights granted to authors of literary and artistic works under this Treaty in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.

⁴⁷ *Ibid.*, pp. 15-16

(2) Contracting Parties may, in their national legislation, provide for limitations of or exceptions to the rights granted to authors of literary and artistic works under this Treaty in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.⁴⁸

Any new limitation or exception must be analyzed in light of the three-step test already present in the Berne Convention⁴⁹ and reiterated in the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS):⁵⁰ (1) the limitation or exception must be a special case that (2) does not conflict with the normal exploitation of the work and (3) does not unreasonably prejudice the legitimate interests of the author.

This tree-step test was applied and analyzed by a WTO Panel in a case between the United States and the European Union.⁵¹ In that case, the Copyright Act provided certain exceptions for stores, which were authorized to disseminate music without having to pay the creators for the use they thus made of their works. It must therefore be recognized, apart from the Panel's interpretation of the three-step test, that the risk that Canada might also be taken before such a Panel is real and that risk should be taken into account in analyzing the advisability of amending Bill C-11 to try to limit the harm that the new measures could cause for creators. To solve the problem and avert such proceedings, it would therefore be preferable and desirable for the levy system to be extended to private copying.

Proposed amendment

We therefore propose that the present paragraph (c) in section 29.22 be deleted, and that it be replaced by a provision that might read as follows:

(c) eligible authors, performers and makers shall be entitled, in respect of reproductions of works for private purposes, to a levy paid by the manufacturer or importer of the support or device, in accordance with the provisions of sections 82 *et seq.* of the Copyright Act.

As well, the present conditions, which are connected with acts subsequent to the authorized reproduction, should ideally be framed as prohibitions on use of the reproduction. In addition to these reservations, we would reiterate the criticisms we stated earlier regarding technological protection measures, based on which we would call for deletion of the subsection relating to the prohibition on circumventing technological protection measures. Section 29.22 might therefore read as follows:

⁴⁸ WIPO Copyright Treaty (WCT), article 11 [on line]

http://www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html (retrieved on January 13, 2011)

⁴⁹ Berne Convention for the Protection of Literary and Artistic Works, [on line]

http://www.wipo.int/treaties/fr/ip/berne/trtdocs_wo001.html (retrieved on January 17, 2011)

⁵⁰ Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), [on line] http://www.wto.org/english/docs_e/legal_e/legal_e.htm#TRIPs (retrieved on January 17, 2011)

⁵¹ Report of the Panel of the World Trade Organization, *United States – Section 110(5) of the US Copyright Act*, 15 June 2000, WT/DS160/R. There has been extensive commentary on that decision and so we will not comment on it.

29.22(1) It is not an infringement of copyright for an individual to reproduce a work or other subject-matter or any substantial part of a work or other subject-matter if:

(a) the copy of the work or other subject-matter from which the reproduction is made is not an infringing copy;

(b) the individual legally obtained the copy of the work or other subject-matter from which the reproduction is made, other than by borrowing it or renting it, and owns or is authorized to use the medium or device on which it is reproduced;

(c) the reproduction is made and used only for the individual's private purposes.

(2) Eligible authors, performers and makers shall be entitled, in consideration of reproductions of works for private purpose, to remuneration paid by the manufacturer or importer of the support or device, in accordance with the provisions of sections 82 *et seq.* of the Copyright Act;

(3) For the purposes of paragraphs (1)(b) and (c), a "medium or device" includes digital memory in which a work or subject-matter may be stored for the purpose of allowing the telecommunication of the work or other subject-matter through the Internet or other digital network.

(4) It is an infringement of copyright

(a) to give the reproduction to a third party; or

(b) to keep the reproduction when the individual has transferred the copy that was reproduced.

(d) Fixing signals and recording programs for later listening or viewing

As we stated earlier, we advocate deleting section 29.23, and creating instead an extended right of reproduction for private purposes.

(e) Backup copies

Clause 22 of Bill C-11 proposes to introduce a section 29.24 into the *Copyright Act*. This would be a new exception for the benefit of users: the right to make backup copies.

Traditionally, the right to make backup copies was reserved for software (the Act uses the expression “computer software”). Section 30.6(b) of the *Copyright Act* provides:

It is not an infringement of copyright in a computer program for a person who owns a copy of the computer program that is authorized by the owner of the copyright to ... make a single reproduction for backup purposes of the copy or of a reproduced copy referred to in paragraph (a) if the person proves that the reproduction for backup purposes is destroyed immediately when the person ceases to be the owner of the copy of the computer program.⁵²

Bill C-11 therefore proposes to allow users to make backup copies of all copies of works they own. However, section 29.23 of the *Copyright Act* as proposed by the bill already allows reproductions of works to be made. The introduction of this kind of exception to copyright would, in our opinion, pointlessly complicate the *Copyright Act*: a user will reasonably be able to ask what works they are entitled to make a backup copy of ... and how that differs from a reproduction for private purposes?

We said earlier that the bill should attempt to make the rights granted to users as clear as possible, so they are able to be certain that the uses they make of works are covered by the exceptions to the *Copyright Act* and know what the limits of the rights granted to them are.

Introducing the right to make backup copies, however, creates confusion and uncertainty, by establishing two different schemes for backup copies, depending on whether the copy is of a computer program or of other works that are not computer programs.

Here we might also reiterate our criticisms relating to the conditions governing this exception and to technological protection measures: the fact that the impossibility of exercising the right to make a backup copy when a technological protection measure is incorporated in the work unduly limits the rights of users. It will be noted that clause 31 of Bill C-11 (which replaces section 30.6 of the *Copyright Act*) does not prohibit circumventing technological measures in the context of backup copies of computer programs.

Clauses 22 and 31 of Bill C-11 call for specific comments.

Clause 22 of Bill C-11 proposes a new section 29.24(1) of the *Copyright Act*, which would provide:

It is not an infringement of copyright in a work or other subject-matter for a person who owns — or has a licence to use — a copy of the work or subject-matter (in this section referred to as the “source copy”) to reproduce the source copy if ...⁵³

⁵² Section 30.6 of the *Copyright Act*

⁵³ Clause 22 of Bill C-11 proposing to add section 29.24 to the *Copyright Act*, [on line] <http://www.parl.gc.ca/HousePublications/Publication.aspx?Docid=5144516&file=4> (retrieved on October 4, 2011)

That subsection, as it stands, leaves an element of confusion in the understanding of the copyright rules. The same is true of clause 31 of Bill C-11, which would amend section 30.6 of the *Copyright Act* as follows:

It is not an infringement of copyright in a computer program for a person who owns a copy of the computer program that is authorized by the owner of the copyright, or has a licence to use a copy of the computer program, to reproduce the copy ... for the sole purpose of obtaining information that would allow the person to make the program and another computer program interoperable; ...⁵⁴

The owner of the copy of a work is the owner only of the support of the work, unless the creator has assigned all their rights in the work. The licence itself is granted by the creator or copyright owner to the user and actually relates (or should relate) to copyright. A user's ownership of a support cannot operate to limit the creator's exercise of their copyright, nor can the licence operate to limit the user's rights.

On this point, Séverine Dusollier explains:

[TRANSLATION] If there is in fact a sale, it is of a copy of a computer program or database, and not of the work itself. Otherwise, it would amount to a complete assignment of copyright in the work, and that simply does not correspond to the reality of this kind of commercial distribution. The licence applies to the work, which is distinct from the physical copy in which it materializes. ...

Nonetheless, that contractual device, which is indeed complex, may be separated into two distinct contracts: the first is the contract of sale for the support, or for services, if it is a download or remote use, and the second is the contract of licence relating to the author's rights in the work incorporated on the support or transmitted by a computerized method.⁵⁵

Licences that are granted systematically prohibit making a backup copy. That is particularly the case for video games: prior to using them, users must agree to end-user licence contracts.⁵⁶

This practice, of attaching licence contracts to the sale of the support for the work, has begun to be widespread in the video industry with Blu-Ray disks, or in publishing, with electronic books, but also in music, with platforms such as iTunes.

⁵⁴ Clause 31 of Bill C-11 amending section 30.6 of the *Copyright Act*, [on line] <http://www.parl.gc.ca/HousePublications/Publication.aspx?Docid=5144516&file=4> (retrieved on October 4, 2011).

⁵⁵ DUSOLLIER, Séverine, *Droit d'auteur et protection des œuvres dans l'univers numérique*, Larcier, Brussels, 2007, p. 413

⁵⁶ For example, the licence granted by the "Rockstar" company, which states: "You agree not to: Make a copy of the Software or any part thereof" [on line] <http://www.rockstargames.com/eula/en> (retrieved on January 20, 2011); Electronic Arts also prohibits copying the FIFA Soccer 10 video game: article 1d of the licence contract [on line] http://www.ea.com/portal/pdf/legal/EULA_en_SecuROM_Disk_and_Digi_No_Ad_PC_20090824.pdf (retrieved on January 20, 2011)

Accordingly, given the consumer's inability to negotiate these licence contracts and exercise their rights as a user, we suggest that Bill C-11 clearly state that the rights granted to users by the Act, often through exceptions to the sole rights of copyright owners, are declared to be matters of *ordre public* [public interest], and that the Act recognize that users may not waive them.

Proposed amendment

Clause 21 of Bill C-11 should be amended, and propose that section 29 of the *Copyright Act* also provide as follows:

No person may, by agreement, require that a user waive a right granted to them by any exception to copyright provided in this Act.

(3) Holding Internet service providers accountable

With respect to holding Internet service providers accountable, Bill C-11 legalizes ISPs' current practices. The "notice and notice" system is regulated by adding section 41.26 to the *Copyright Act*.

This "notice and notice" system is already in place and is used as a prevention method to deal with users who engage in certain acts that would infringe copyright. The operation of the system is fairly simple. A copyright owner who identifies a use of one of their works on the Internet that they consider to infringe their rights sends a message to the infringing user's Internet service provider alleging the infringement. The ISP will then be responsible for transmitting the notice to the user.

Some copyright owners are calling for section 41.26 to be amended and replaced by a "notice and takedown" system like the one found in the American Digital Millennium Copyright Act.⁵⁷ Unlike in the "notice and notice" process, the copyright owner would not merely send an allegation of infringement to the Internet service provider or the host of the content; they could, by applying a "notice and takedown" procedure, and on simple notice to the access provider, request that the content they deem problematic be taken down from the network. It would then be up to the user, if they chose, to send the service provider a counter-notice asking that the content be kept on line, by establishing that they were not guilty of the infringement alleged. However, the "notice and takedown" system has serious flaws and has been strongly criticized in the United States.

⁵⁷ 17 U.S.C. §§ 512

Some have criticized the system, in particular, for the excessive powers it grants to copyright owners, who have sometimes used it to try to limit freedom of expression. On that point, the Electronic Frontier Foundation (EFF) publishes a “Takedown Hall of Shame” on its Internet site, detailing takedown demands made improperly by copyright owners. For example, Universal Music Group demanded that a program that criticized one of its artists be taken down;⁵⁸ Warner Music Group has made several demands for amateur videos on YouTube that sang songs in which Warner owns the rights to be taken down.⁵⁹ These are just two examples of the long list of instances in which the “notice and takedown” procedure has been used that EFF characterizes as shameful.

Other copyright owners are asking that the Act require Internet service providers to pay compensation for works that circulate on the Internet and infringe their rights.⁶⁰ In fact, copyright owners are calling on Internet service providers to pay for all acts they consider to be illegal that are committed on networks by users. If Internet service providers were required to pay such “royalties”, we could confidently predict that they would raise Internet subscription rates to reflect this. In other words, all users, whether or not they infringe copyright, would have to pay compensation. If such a royalty scheme were to be contemplated, it would be wise to propose a more logical and fairer system. It is indeed odd to consider a system that both proposes to continue and even increase the number of violations of the *Copyright Act* (users who would pay even though they were not infringing would have an incentive to do so) and proposes payment of “royalties” by non-infringers when they should, in so far as possible, be levied only against those who intend to act in ways that may affect copyright works. In the following section we will come back to an approach that would seem to us to be more acceptable.

(4) Liability of service providers

Clause 18 of Bill C-11 proposes to introduce new subsections (2.3) and (2.4) into section 27 of the *Copyright Act*:

⁵⁸ “Music Publisher Tries to Muzzle Podcast Criticizing Akon”, [on line] <https://www.eff.org/takedowns/music-publisher-tries-muzzle-podcast-criticizing-a> (retrieved on January 22, 2011)

⁵⁹ “YouTube's January Fair Use Massacre”, [on line] <https://www.eff.org/deeplinks/2009/01/youtubes-january-fair-use-massacre> (retrieved on January 22, 2011)

⁶⁰ Radio Canada, “Les artistes montent aux barricades”, [on line] http://www.radio-canada.ca/nouvelles/arts_et_spectacles/2010/11/30/001-droit-auteur-manif.shtml (retrieved on January 22, 2011) [TRANSLATION] “Among other things, artists are calling for royalties from Internet service providers to compensate for the losses they suffer as a result of illegal music downloading on the Internet.”

(2.3) It is an infringement of copyright for a person, by means of the Internet or another digital network, to provide a service primarily for the purpose of enabling acts of copyright infringement if an actual infringement of copyright occurs by means of the Internet or another digital network as a result of the use of that service.

(2.4) In determining whether a person has infringed copyright under subsection (2.3), the court may consider

(a) whether the person expressly or implicitly marketed or promoted the service as one that could be used to enable acts of copyright infringement;

(b) whether the person had knowledge that the service was used to enable a significant number of acts of copyright infringement;

(c) whether the service has significant uses other than to enable acts of copyright infringement;

(d) the person's ability, as part of providing the service, to limit acts of copyright infringement, and any action taken by the person to do so;

(e) any benefits the person received as a result of enabling the acts of copyright infringement; and

(f) the economic viability of the provision of the service if it were not used to enable acts of copyright infringement.⁶¹

Those provisions have been described as the ones that will tackle online services that allow works protected by copyright to be downloaded and made available on the Internet. In other words, the aim is to put an end to services like isoHunt or The Pirate Bay.⁶²

⁶¹ Clause 18 of Bill C-11 proposing to add new subsections (2.3) and (2.4) to section 27 of the *Copyright Act*, [on line]

<http://www.parl.gc.ca/HousePublications/Publication.aspx?Docid=5144516&file=4>
(retrieved on October 4, 2011).

⁶² Testimony of Barry Sookman before the Legislative Committee on C-11 [C-32 – Tr.] on December 1, 2010: "Of course, in a Canadian situation we have problems similar to The Pirate Bay. We have isoHunt, which is the second-largest BitTorrent site in the world. It is the largest in Canada. We have seven other BitTorrent sites operating in Canada, and many leech sites and other sites. The Pirate Bay is a good litmus case to think about. We have those problems in Canada that need to be addressed, and the enablement provision would very much help to do that." (emphasis added), [on line]

<http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=4839067&Language=F&Mode=1&Parl=40&Ses=3> (retrieved on January 22, 2011)

However, that section cannot be read independently of the provisions of clause 35 of Bill C-11, which proposes to introduce a section 31.1 into the *Copyright Act* and which would specifically target Internet service providers:

31.1(1) A person who, in providing services related to the operation of the Internet or another digital network, provides any means for the telecommunication or the reproduction of a work or other subject-matter through the Internet or that other network does not, solely by reason of providing those means, infringe copyright in that work or other subject-matter.

(2) Subsection (1) does not apply in respect of a service provided by the person if the provision of that service constitutes an infringement of copyright under subsection 27(2.3).⁶³

When read together, these proposed sections, 27(2.3), (2.4) and 31.1 of the *Copyright Act*, indicate that if Internet service providers do not want to be held liable and be subject to proceedings themselves for copyright infringement, they would be obliged to block Internet services that would be likely to permit copyright infringements (or potentially result in infringement allegations by copyright owners). That obligation inevitably prompts us to wonder about the infringement of the freedom of expression guaranteed by the Canadian Charter of Rights and Freedoms⁶⁴ that would result from blocking services on networks, and more generally, about Internet neutrality, which it seems to us it is essential to guarantee. It is certainly not up to access providers to decide what sites should or should not be accessible to Internet users.

While some might think this type of approach promising, in theory, it would be wise for Parliament to consider foreign experiences in this area, each of which has been more futile than its predecessors, and none of which has enabled creators to be remunerated, whether it be in Sweden, with the IPRED law which was supposed to put an end to piracy,⁶⁵ or in France, with the HADOPI law, where Internet users turned away from applications governed by HADOPI and continued to engage in their usual practices by other methods.⁶⁶ All these desperate attempts to put an end to piracy are a waste of time, and a waste of money for the creators and actors in the digital economy.

It is deplorable to observe that the choice some people still seem to prefer, in spite of how that approach has failed, is the punitive method, which has demonstrated its ineffectiveness. Surely it is finally time to set to work on finding new mechanisms for remunerating creators: a licence for making works available on networks, paid for by users, to their Internet service providers,

⁶³ Clause 35 of Bill C-11 proposing to add section 31.1 to the *Copyright Act*, [on line]

<http://www.parl.gc.ca/HousePublications/Publication.aspx?Docid=5144516&file=4> (retrieved on October 4, 2011) [The material identified as subs. (2) does not appear in Bill C-11 – Tr.]

⁶⁴ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, <http://www.canlii.org/en/ca/const/const1982.html> (retrieved on January 26, 2011)

⁶⁵ CHAMPEAU Guillaume, “La loi suédoise IPRED est un succès: le piratage augmente, les ventes aussi”, [on line], <http://www.numerama.com/magazine/15417-la-loi-suedoise-ipred-est-un-succes-le-piratage-augmente-les-ventes-aussi.html> (retrieved on January 22, 2011)

⁶⁶ Zdnet content, Hadopi: “75% des adeptes du téléchargement n'ont pas modifié leurs habitudes”, [on line] <http://www.zdnet.fr/actualites/hadopi-75-des-adeptes-du-telechargement-n-ont-pas-modifie-leurs-habitudes-39757470.htm> (retrieved on January 22, 2011)

would seem to us to be a more effective, more viable and more equitable approach in this regard. We think this kind of approach, where creators would be paid by the users of copyright works, with the money collected by their Internet service provider, would be best able to satisfy all parties. Surely this kind of measure would be preferable to attempting to hold Internet service providers accountable, when they would have no choice but to implement Internet blocking or filtering; not only is that ineffective, but it would also probably call for substantial financial outlays – money that would in fact be charged to the consumer, let there be no doubt about it. Because this kind of approach would have the foreseeable effects of limiting the circulation of works, jeopardizing Internet neutrality and freedom of expression and generating costs for consumers, while the money would never benefit the creators, who do, indisputably, want to see their works more widely disseminated, we still believe it is high time to reassess priorities and work on developing a framework that benefits all the parties involved.

We would point out that some countries have in fact blazed the trail. In Spain, the courts have consistently refused to find against sites that permitted downloading and made works available on the Internet. As one court very lucidly stated: [TRANSLATION] “An adverse ruling would mean penalizing a socially accepted practice and a behaviour that is widely engaged in, where the goal is not illegal enrichment, but to obtain private copies.”⁶⁷

Here we would just draw a parallel with what Montesquieu wrote in *The Spirit of Laws*, and hope that the Parliament of Canada will be inspired by it, as well:

We have said that the laws were the particular and precise institutions of a legislator, and manners and customs the institutions of a nation in general. Hence it follows that when these manners and customs are to be changed, it ought not to be done by laws; ...⁶⁸

Thus, as some foreign experiences have shown, present-day manners cannot be changed by laws, and laws will not deter Internet users from applications or sites that enable them to obtain copies of works.

It is wise to recall that the purpose of copyright legislation is to promote the dissemination of creative works, and also to ensure that creators are fairly remunerated. If present-day technologies and practices operate to permit unprecedented dissemination of creative works, it would be absurd to try to use legislation whose goal is precisely to provide broad dissemination to somehow curb those phenomenal opportunities for access. The wisest course, on the contrary, would be to keep that other goal in mind, that being the one that present-day practices alone are unable to guarantee will be achieved: fair remuneration for creators.

⁶⁷ Champeau, Guillaume, “Le partage par P2P est légal en Espagne selon la Justice !”, [on line], <http://www.numerama.com/magazine/3519-Le-partage-par-P2P-est-legal-en-Espagne-selon-la-Justice.html> (retrieved on January 26, 2011)

⁶⁸ Montesquieu, *The Spirit of Laws*, Book 19, Chap. 14, [on line] http://www.voltaire-integral.com/Esprit_des_Lois/L19.htm#L19_14 (retrieved on January 22, 2011)

For that reason, we suggest that remuneration for creators be implemented that would be based on collective management of the right to make works available. In practice, users who wanted to make works available on the Internet could obtain a licence, which would in fact be proposed with the user's Internet services subscription. An additional amount, at a rate set by the Copyright Commission, would thus be collected from the user by the Internet service provider, and that amount would then be paid to the copyright collective that managed the licence and handled the redistribution of the amounts collected.

It is wrong to say that "free culture" is currently dominant on digital networks and that consumers will refuse to pay for what they are currently getting without paying for it directly. Consumers recognize the value of creation, and experience has shown that when creators leave users free to set the price of music themselves, and even give them the option of paying nothing at all, a large majority of users are prepared to spend money to support creators. We think the numerous examples of this, like the offers by *Misteur Valaire*, *Radiohead*, or *Nine Inch Nails*, speak volumes in this regard.

We therefore urge Parliament, in this reform, to ensure that the present balance in the *Copyright Act* is preserved, by allowing creators to be remunerated for uses of their works, and allowing users to have access to those works and to culture and to exercise their rights fully.