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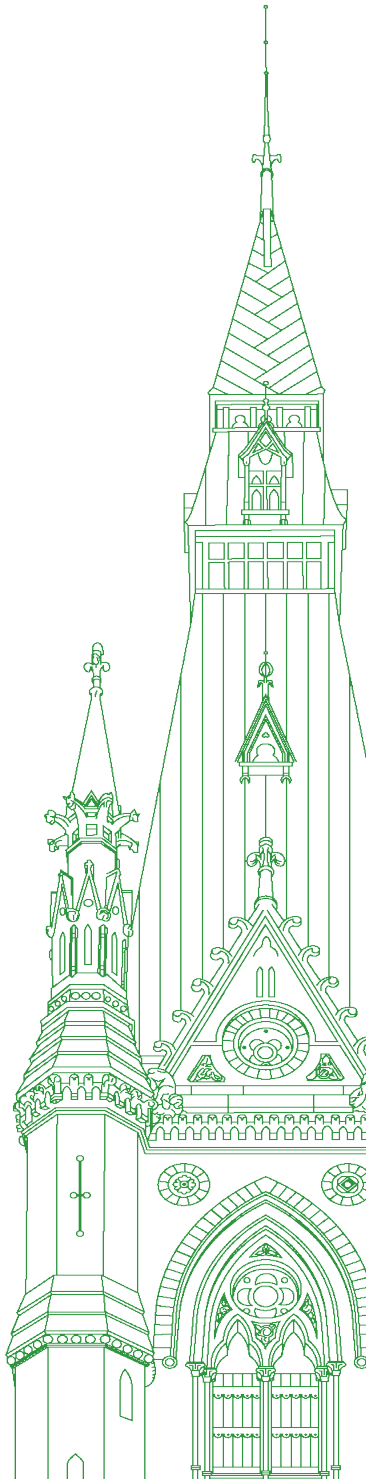

Chair: Mr. Joël Lightbound

Standing Committee on Industry and Technology

Wednesday, March 8, 2023

● (1645)

[*English*]

The Chair (Mr. Joël Lightbound (Louis-Hébert, Lib.)): I call this meeting to order.

[*Translation*]

Welcome to meeting number 61 of the House of Commons Standing Committee on Industry and Technology.

Pursuant to the order of reference of Wednesday, November 30, 2022, we are considering Bill C-294, An Act to amend the Copyright Act (interoperability).

Today's meeting is in hybrid form, pursuant to the House order adopted on Thursday, June 23, 2022.

I want to begin by thanking all the witnesses who are joining us today on this Wednesday afternoon, and offer our apologies on behalf of the committee for the brief delay in starting the meeting. We had to vote in the House.

Without further ado, Mr. Lemire, you have the floor.

Mr. Sébastien Lemire (Abitibi—Témiscamingue, BQ): Thank you, Mr. Chair.

I want to make sure that the sound tests have been done and that all participants have headsets that comply with the rules and are recognized by the House of Commons.

The Chair: Thank you, Mr. Lemire.

Yes, I can reassure you, I saw that the sound tests were indeed carried out.

Mr. Sébastien Lemire: Thank you, you're a brick.

The Chair: Thank you for checking that.

With us today, we have, as individuals, Ms. Alissa Centivany, assistant professor at Western University, and Mr. Anthony D. Rosborough, research fellow in the Department of Law at the European University Institute, joining us by videoconference.

We have, from the Canada West Foundation, Mr. Carlo Dade, director of the Trade and Investment Centre, here with us. From Honey Bee Manufacturing Ltd., we have Mr. Jamie Pegg, general manager, and Mr. Scott Smith, manager of components, systems and integration.

From the Intellectual Property Institute of Canada, we welcome back Ms. Catherine Lovrics, chair of the Copyright Policy Committee, and Ms. Colleen Stanley, member of the Copyright Policy Committee.

Finally, from the Public Interest Advocacy Centre, we welcome Mr. John Lawford, executive director and general counsel.

Welcome, and thank you all for joining us.

We have a very busy meeting today.

Without further ado, we will begin with you, Ms. Alissa Centivany. You have the floor for five minutes.

[*English*]

Dr. Alissa Centivany (Assistant Professor, Western University, As an Individual): Good afternoon, Mr. Chairman and honourable members of the committee.

My name is Alissa Centivany. I'm an assistant professor at the faculty of information and media studies at Western University, where I work on technology, policy, law and ethics, and I serve as co-director of Tesserae, The Centre for Digital Justice, Community and Democracy at Western University.

I have a JD specializing in intellectual property law and a Ph.D. in information science. I've held research appointments at the Center for Law & Technology at the UC Berkeley law school and at the Centre for Innovation Law and Policy at the University of Toronto law school.

I'm currently the primary investigator on a SSHRC-funded study of copyright, computerization and the right to repair. I'm grateful for the opportunity to speak with you today about Bill C-294. This bill improves the existing exemption, but in my view, it doesn't go far enough.

First, I'd like to acknowledge that this topic is both critically important and also somewhat inaccessible. Interoperability demands that we navigate between distinct, sophisticated, highly technical fields—copyright law and technological protection measures, or TPMs, on the one hand, and the design of complex emerging technologies on the other.

This is no easy task. I caution the committee to be wary of what I call “strategic befuddlement”, a tactic of using overly technical jargon that is employed by some stakeholders to obfuscate and confuse, rather than illuminate, what's really at stake. With that in mind, I'd like to make a few brief, hopefully straightforward, big-picture points and offer a few recommendations.

Interoperability is the act of making a new product or service work with an existing one. This includes peripherals, consumables, interfaces, data, software, replacement parts and so forth. Interoperability is good for consumers, for research, for follow-on innovation and for competition. The standards and shared norms at the heart of interoperability make life simpler, more efficient and more connected.

Interoperability can be co-operative, ambivalent or adversarial. It's this last category, coined by Cory Doctorow and the Electronic Frontier Foundation, that is perhaps most relevant to our discussion today. Adversarial interoperability, also called competitive compatibility, refers to new products and services connecting to existing ones against the wishes of the original company.

Before TPMs were added to the Copyright Act, this form of non-consensual interoperability was a normal way of innovating in tech and other sectors. TPMs changed that, though.

TPMs were originally intended to create artificial digital scarcity so that creators of creative and artistic works who feared that the burgeoning Internet would lead to unfettered infringement on their works online wouldn't lose all incentive to create. Times have changed. We can now see that TPMs overshot their original mark. Today TPMs are used to restrict a wide range of lawful non-infringing activities that bear no relationship to protected works at all. By being keyed to access rather than infringement, TPMs have been a disaster for consumers.

Even with the current interoperability exemption, TPMs have also been a disaster for follow-on innovation, because they can still be used to inhibit competition and protect the business models of incumbents. For example, in the context of repair, companies today routinely use proprietary tools and interfaces and parts-pairing restrictions to block third party replacement parts and lock out independent service technicians.

Even more troubling, though, is that companies like Apple, John Deere and video game console makers Microsoft and Sony even block their own authentic OEM parts from interoperating with their products absent some additional authorization by, and payment to, a company-approved technician. The use of TPMs to block interoperability is anti-competitive, anti-innovation and anti-consumer, and it reflects, in my view, an astounding degree of corporate greed.

There's a lot of talk about how we live in a connected world, but what all this shows, I think, is that we don't really. TPMs lock consumers and third parties out. They also lock us in to ongoing relationships with companies and service providers whether we like it or not. We live in walled gardens, platform bubbles and tech silos—disconnected, closed worlds—and we are largely stuck because restrictions on interoperability have enabled switching costs to rise to untenable levels. We lack the economic agency to leave for an alternative or substitute provider. No matter how nice the trappings might appear at times, a cage is still a cage.

Bill C-294 represents a step in the right direction, but in my view, it doesn't go far enough. In addition to what I've already said, I'm concerned that the entirety of the Internet of things may remain insulated, given the bill's focus on embedded computer programs.

In terms of offering some recommendations, I have a few that I'll put forward in a descending order of radicalness.

First, we could get rid of anti-circumvention provisions. Infringement is already illegal. Let's let the Copyright Act do what it was designed to do.

Second, we could mandate interoperability rather than permit it in limited circumstances.

Third, we could create broad immunity for acts aimed at promoting interoperability.

Fourth, we should absolutely reform the TPM provisions to make it clear that anti-circumvention applies only to infringing activities, and that exemptions to infringement, such as fair dealing and research, are preserved.

Finally, we should create broad exemptions for interoperability that include not just computer programs and embedded systems but also smart technologies, peripherals, consumables, interfaces, data formats, connectors and so forth. Making and trafficking in tools to accomplish the above should also be clearly exempt.

Thank you for this opportunity to speak with you today.

● (1650)

[*Translation*]

The Chair: Thank you very much, Ms. Centivany.

Mr. Rosborough, it is your turn and you have the floor for five minutes.

[*English*]

Mr. Anthony D. Rosborough (Researcher, Department of Law, European University Institute, As an Individual): Good afternoon, Mr. Chairman and honourable members of the committee.

It is my pleasure to once again appear to share my perspective on copyright, software TPMs and anti-circumvention policy. This time it is in relation to the proposed Bill C-294 and interoperability.

I am a doctoral researcher in law at the European University Institute and a graduate of the Schulich School of Law at Dalhousie University. I am also a practising member of the Nova Scotia Barristers' Society.

My doctoral thesis explores the design, function and implications of TPMs across the automotive, consumer electronics and agricultural equipment industries. My research includes an exploration into how TPMs impact innovation and interoperability. I have spent a significant amount of time learning from cybersecurity experts, electrotechnical engineers and Canadian innovators to better understand this issue and its relationship to copyright law.

In 2021, I published a peer-reviewed article in the Canadian Journal of Law and Technology that examines Canada's copyright interoperability framework and addresses many of the issues under consideration by the committee today. I have provided an electronic copy of this article to the committee clerk for your review.

Overall, I strongly support this bill and the concerns of Canadian innovators who have found TPMs to be an obstacle to devising new products and services as well as a source of considerable business risk and uncertainty.

These perspectives demonstrate that innovation in the 21st century does not occur in a vacuum. It's a cumulative process and it thrives when knowledge and expertise can be devoted to improving the technologies we already have to perform new and unprecedented things. In the world of embedded computer systems and the Internet of things, interoperability is synonymous with innovation.

Bill C-294 reflects this reality, and it reflects the needs of Canadian innovators by not allowing manufacturers to prevent competition in secondary markets under the auspices of copyright.

In my remarks today, I would like to make three main points. First, I'll explain why the Copyright Act's existing interoperability exception is inadequate. Second, I'll explain how the bill could be improved. Finally, I'll clarify the appropriate role and scope of copyright law in this context.

In the concept of interoperability in the act, the existing exception allowing circumvention of TPMs conceptualizes interoperability as the mutual exchange of information between two computer programs. Given the history of this exception, this narrow view is understandable.

The existing exception was included in the act as part of the Copyright Modernization Act over a decade ago. However, a lot has changed since 2011. Policy experts and standards organizations around the world now recognize a much more complex and context-specific understanding of interoperability. This includes embedded systems, computerized devices and Internet of things technologies.

This bill takes the right approach by broadening the application of the interoperability exception to include not only computer programs but also devices in which they are embedded. This is crucial, because the distinction between the computer program and the computing hardware is much less clear than it once was. In the past, it may have been easier to distinguish between hardware and software, but when software now controls the physical functioning of devices and components, the software and hardware blend together. As I wrote in my 2021 article, the Copyright Act's conceptualization of interoperability needs to reflect today's computing and innovation paradigm. Computers are no longer just boxes with screens and keyboards. They are cars, home appliances, pacemakers, agricultural equipment and learning technologies.

By viewing interoperability narrowly, as purely a relationship between two computer programs, the act's existing exception does not address the reality of 21st century computing or 21st century innovation.

Here is how the bill can be improved.

Though the bill offers a lot of promise by expanding interoperability to devices and components, there remains one important drawback left over from the existing exception. That is the caveat that the person circumventing the TPM—who is not a manufacturer themselves—must own "the computer program or a copy of one, or has a licence to use the program or copy".

It may not be clear in every case that a person circumventing a TPM for interoperability has a licence to use the computer program embedded in the device or is the owner of a copy of the program. For this reason, the bill could be improved by making it clear that the ownership of a device or component in which a computer program is embedded creates an implied licence to use that computer program.

Legislating an implied licence to use the embedded program for interoperability would enable Canadian innovators and researchers outside of the manufacturing context to develop interoperable solutions without the prior consent of the original manufacturer. This would create a more open and competitive marketplace and better choices for consumers and ensure that copyright law is not used by foreign multinationals to stymie Canadian research and innovation.

● (1655)

This brings me to my last point: to clarify the role of copyright law when it comes to innovation and computing.

The purpose of copyright law is to incentivize the production of artistic and literary works. It encourages authors to bring ideas into the public realm. Software is a type of work capable of copyright protection, but the physical functioning of the devices that it controls is not and never was intended to be within the scope of copyright law and policy.

If we follow the logic of rights holders, it goes something like this: Where there is computing hardware, there is software; where there is software, there is copyright; and where there is copyright, TPMs can be used to prevent access. The trouble is that even when access to software bears no relationship to infringement, the act still treats that as an unlawful activity.

Though original equipment manufacturers and industry groups may contend to this committee that the bill could enable piracy-related circumvention of TPMs for infringing acts under the auspices of interoperability, this fearmongering is unfounded, for two reasons.

First, I strongly doubt that any of us are interested in making unlawful copies of the firmware used by our microwaves, televisions or laptop computers, and I have a hard time believing that bootlegged copies of firmware would attract much interest on illicit markets.

Second, and more importantly, we need to be clear about what is really being contorted here. The bill is not about enabling piracy under the auspices of interoperability; the bill is about preventing OEMs from roadblocking innovation and research under the auspices of copyright.

At a fundamental level, access-control TPMs in physical devices undermine the public policy goals of the copyright system as a whole. They function as absolute barriers to the diffusion of knowledge, are indefinite in duration and can undermine Canadian competitiveness and innovation in the global marketplace. Innovation, research and discovery are not infringing activities. Canadian innovators should not be held hostage by copyright protections designed decades ago to protect digital content industries from online infringement.

To conclude, I ask this committee to consider amending the bill to include an implied licence to use the computer program embedded in the device or component necessary to achieve interoperability. That would broaden the scope of the bill's application to research and innovation beyond product manufacturing. Following such an amendment, I wholeheartedly recommend that this committee move the bill forward toward royal assent.

Thank you.

The Chair: Thank you very much, Mr. Rosborough.

We will now go to the Canada West Foundation and Mr. Dade.

The floor is yours for five minutes.

[*Translation*]

Mr. Carlo Dade (Director, Trade and Investment Centre, Canada West Foundation): Thank you very much, Mr. Chair.

I'm going to skip my introduction about the Canada West Foundation and start directly with my testimony. I hope everyone is already familiar with our foundation. We are a policy research centre for the four western provinces of Canada.

[*English*]

From western Canada we've spent years—over a decade—working on the issue of right to repair. Given the importance of agriculture for western Canada and for our export-based economy that supports the west and Canada, it has been an issue of obvious concern.

Based on that work, about five years ago we received a call out of the blue from Frontier, Saskatchewan, on an issue that's related to right to repair, a manifestation of the work we've been doing on guaranteeing the rights of farmers to access their equipment. That issue is important not just to the west; it's important to Canada. It's a national issue.

What I'd like to do today is skip over the technical briefing—you have Anthony, a much better expert than I, to go over the technical aspects—and talk about why this issue is important to the nation. There are five reasons in terms of context.

Number one is a phrase that all of you have used frequently, and it is a national priority: good middle-class jobs. This company and others like it across the west and in Ontario and elsewhere are producing good middle-class jobs. Since the last time Honey Bee was here, they've added 20 of these jobs.

That may not seem like a lot, but if you drive south from the Trans-Canada to the U.S. border and go through Gull Lake, Shaunavon and other communities and rural areas that have been hollowed out, you see boarded-up buildings. You'll see them in downtown Shaunavon. A company that has 200 good middle-class jobs supports not just the town of Frontier but the southwest corner of Saskatchewan. Keeping these jobs is important. It's something that we've made a national priority, and it's something that this industry is doing out of the headlines, in rural and remote areas where you don't expect this.

Number two is private diversification.

● (1700)

[*Translation*]

Everyone tells the western provinces:

[*English*]

Stop hewing water and drawing wood. Yes, I do that backwards, because we're sick of hearing it. We're sick of hearing it because we're doing that: We are building on our capacity to do things like difficult dry land farming and building new products. We are building on our strengths. We are diversifying, yet it's getting missed.

Third is market diversification. You hear this time and time again. Our entire Indo-Pacific strategy is about trying to get to new markets. If you're making new products, you're going to new markets. The figures on the growth of this industry, and the growth into new markets without help from the government and without massive subsidies.... People are coming to Canada because of our unique ability to make products that the OEMs won't and to solve problems that others won't.

The fourth reason is innovation. I don't know how much the government just spent on the new innovation program, but you want to see innovation. Innovation is in the DNA. It's the origin story for these companies. They solve problems because they have to.

Out in the middle of nowhere, no one is going to make a head or a seeder to fit your particular landscape for your needs. Farmers stepped up to make the innovations. They did it so well that others from around the globe came to us to fill the niche that Deere and others wouldn't, because their header was good enough, so why did it have to fit your particular needs? It's a niche, but this is innovation. This is what we say we want Canadian companies to do. These are things we have as national priorities, yet in our rush to fund new things and in a rush to fund new programs, we forget about the successes we already have.

We're chasing the bird in the hand and forgetting about the one in the bush. That's detrimental to our national objectives of private diversification, market diversification and innovation.

The other issue here is bipartisanship. This is an issue that is not just in western Canada. When we first started working with Honey Bee and others like Anthony and the agricultural equipment groups that came on board, we reached out to the government, based on the work that we had done and that MP Patzer, in particular, had done at the grassroots level. We reached out to Minister Bains, and he listened. He opened the door, he sat down and he talked with us. He had his political staff talk to us, and they responded. We talked to industry, and they responded. This has been a rare glimmer of bipartisanship, I think, on the national front.

In conclusion, this leaves four questions for you.

Do good, middle-class jobs apply to everyone in Canada, or only those in certain parts of Canada?

On innovation, are we willing to do what's necessary to save the innovation we already have, and not just rush off to try to fund new things?

Do we reward those who have done everything we have asked in terms of product diversification and market diversification, or do we ignore them?

On bipartisanship, is there any hope that we can come together as a nation on some issues? If we can't come together on this issue, I will tell you from western Canada that I don't know if we can find any issue that we can come together on.

To conclude, these are stories that write themselves, all sorts of stories that write themselves for all sorts of media going forward.

That's a bit of context. I will leave the technical definitions to the experts.

● (1705)

[*Translation*]

Thank you very much.

I look forward to your questions.

The Chair: Thank you very much, Mr. Dade.

I now yield the floor to Mr. Jamie Pegg and Mr. Scott Smith, from Honey Bee Manufacturing Ltd.

[*English*]

Mr. Jamie Pegg (General Manager, Honey Bee Manufacturing Ltd.): Mr. Chair and committee members, my name is Jamie Pegg and I have the privilege of representing 180 employees and nine area communities as general manager of Honey Bee Manufacturing. I have with me Mr. Scott Smith, our CSI manager.

Greetings are offered by Ms. Donna Boyd and the 240-plus members of the Agricultural Manufacturers of Canada, and by Mr. John Schmeiser and the 4,000 members of the newly developed North American Equipment Dealers Association.

We want to thank you for the opportunity to express our support for Bill C-294.

Three years ago, we sat before this committee with respect to the CUSMA trade agreement. We discussed the need to address the copyright changes Bill C-294 now brings to the table. In 2020, the reasons for changes were based on expected events. Since then, we have felt the impact.

TPMs have disabled technology at normally interoperable intersections between products from Canadian agricultural manufacturers and OEM equipment platforms. The result is a 53% market denial for Honey Bee in Canada alone. The proverbial USB port has been replaced by an OEM-specific connection that is not publicly documented and has no available compatibility parts.

We are a global company, from the people we work with to the 29 countries we export to. Honey Bee sells 50% of its product in North America and exports the remainder to the rest of the world. However, our industry is still placed on an uneven playing field versus our U.S. counterparts. Foreign platforms seek to prevent participation by Canadian brands.

Honey Bee's opportunity to capitalize on intellectual property is based on our ability to interoperate with OEM equipment platforms. Interoperability means that a Honey Bee harvest header can “plug and play” with OEM equipment. Historically, this has been provided in a straightforward and obvious way, like the way a keyboard plugs into a computer.

Today, Canadian industry is technically blocked by some dominant international brands, with the impact being a loss of substantial market participation opportunity. The net result is “authorized use only”. This is controlled by OEM digital locks and keys that are unavailable to manufacturers of implement. Instead of spending our research budget on innovation, we are burning it on adaptation.

It is important to state that in no way should Canadian manufacturers, dealers and—most importantly—farmer customers be at a disadvantage on choice. Historically, we had an integrated farm equipment market in North America and abroad. Honey Bee innovation caters to the specific needs of many markets and considers their unique environments, practices and crops. Meeting these challenges brings Canadian innovation to the world. The impact of technical lockout by OEMs will be the collapse of our Canadian implement manufacturing industry, which will decimate many of our smaller communities.

In Bill C-294, “innovation” is the act of offering improved components or products for use, either as an independent product or used in conjunction with other products. When innovation is applied in conjunction with another product, it is required to interoperate in a compatible way. In Bill C-244, “repair” is the act of restoring a failed device to its original state, as designed and manufactured. Neither of these needs access to internal source code or involves undesired exposure to valued IP. What is needed is the supply of external specifications for protocols, and interfaces to achieve the required functionality result.

Historically, this has been the norm. As this is no longer the case, it is now an industry requirement that companies can legally reverse-engineer a product. This may include circumventing a TPM for the purpose of accessing the required systems in order to develop the information needed for achieving interoperability or repair.

The CUSMA agreement does not place U.S. and Canadian implement manufacturers on the same footing. U.S. copyright law makes exceptions for legally modified, motorized agricultural equipment for the purpose of interoperability. Canadian copyright law does not. This makes it illegal for Honey Bee, or any other Canadian company, to reverse-engineer OEM platforms to achieve the required interoperability. This means products made in Canada cannot be legally adapted in Canada. Canadian manufacturers and farmers are at a huge disadvantage. Why is that? It's a lack of clarifying language.

Bill C-294 solves this problem.

● (1710)

At the start of this testimony, I offered you greetings from our employees, their families and our communities. My desire is to see the number of employees and families increase with company growth because Bill C-294 is passed. If we really want to support Canadian content and innovation, we should support the work of Canadian manufacturing. By passing Bill C-294, we are voting for Canada.

Thank you.

The Chair: Thank you very much, Mr. Pegg.

We'll now move to Catherine Lovrics for five minutes.

Ms. Catherine Lovrics (Chair, Copyright Policy Committee, Intellectual Property Institute of Canada): My colleague Colleen Stanley, who is in the room with you, will actually be giving our opening submission.

Ms. Colleen Stanley (Member, Copyright Policy Committee, Intellectual Property Institute of Canada): Thank you.

Mr. Chair and honourable members, on behalf of the Intellectual Property Institute of Canada, thank you for the invitation to appear today as part of INDU's study. My name is Colleen Stanley, and I am here as a member of IPIC's copyright committee and a member of the subcommittee on interoperability.

IPIC is pleased to provide comments in response to Bill C-294. IPIC recognizes that the bill aims to remove barriers to the development of third party parts by the Canadian manufacturing industry, particularly in the agricultural sector. The subcommittee studying Bill C-294, however, has had some difficulty in understanding exactly what the specific objectives of Bill C-294 are, as the wording is somewhat uncertain and ambiguous.

From what we can ascertain, the proposed amendments appear to target two main objectives. The first objective is permitting circumvention of a TPM to obtain information from a computer program for the purposes of making it interoperable with another computer program when one or both computer programs are embedded in hardware. In this objective, we're talking about smart products being made interoperable with other smart products. By “smart” products, we mean products that have code or embedded software.

The second objective we see is permitting circumvention of a technological protection measure to obtain information from a computer program, embedded or otherwise, for the purpose of making it interoperable with another product that may not be smart—i.e., making smart products interoperable with non-smart products.

With respect to objective one, the smart interoperable with the smart, IPIC's response is that the amendments are unnecessary. Subsection 41.12(1) in its current form already permits the circumvention of a TPM for the purpose of interoperability of computer programs embedded in hardware. It is clear in Canadian copyright law that “computer program” includes embedded software. The definition of computer program in the Copyright Act is broad, and includes this: “a set of instructions or statements, expressed, fixed, embodied or stored in any manner”. Case law to date supports this interpretation.

In addition to the amendments being unnecessary, they would introduce uncertainty into the Copyright Act. The term “computer program” is used throughout the act, and in each instance is interpreted to include embedded software.

With respect to objective two, where we're talking about smart programs being interoperable with not-so-smart programs, the amendments will likely not achieve the intended objective. That's because the subsection being amended by Bill C-294, subsection 41.12(1), does not work in isolation. It works in conjunction with two other sections of the Copyright Act. One section provides that the benefit of the TPM interoperability exception is lost if the circumvention enables a copyright infringement. The other section provides that reproducing a computer program for the purposes of making it interoperable with another computer program is not an infringement of copyright, but making a computer program interoperable with a product or device is not covered by the infringement exception.

This does not necessarily mean that an infringement would result from breaking a TPM, but in many cases it could. Therefore, as drafted, Bill C-294 would end up creating a TPM circumvention exception that may be available only sometimes or not at all.

With respect to objective two, there is also the issue of treaty compliance. CUSMA sets out the exception for circumventing a TPM for purposes of interoperability and provides that such exceptions be for the sole purpose of achieving interoperability with another computer program.

As well, the use of a broad term like “manufactured product” will introduce uncertainty into the Copyright Act and may result in a TPM circumvention exception that is much broader than originally intended.

In conclusion, if the government wishes to pursue the policy objectives in Bill C-294, IPIC advises taking an approach that considers three factors. The first is how the Copyright Act works as a whole. As discussed, a number of sections of the act work together with subsection 41.12(1), but Bill C-294 amends only that one subsection.

They also have to take into account Canada's international treaty obligations. These require that any exception to the protection of a TPM be carefully crafted, narrowly focused and enable only non-infringing uses.

● (1715)

The third factor is societal safety and security issues. TPMs play a vital role beyond intellectual property protection, and circumventing TPMs can open access to sensitive or private information stored within a computer program or impact its safe operation. The broad variety of TPMs and their related business models calls for a legislative framework that identifies specific cases in which safety and security can be taken into account.

In conclusion, a targeted regulatory approach with a framework for case-by-case assessment that would consider the risks and benefits of each exception is the approach recommended by IPIC to address the policy objectives raised in Bill C-294. IPIC will provide suggested wording for proposed amendments that would address these concerns in its brief, which will follow shortly.

Thank you very much.

[*Translation*]

The Chair: Thank you very much, Ms. Stanley.

To conclude, Mr. Lawford, I yield the floor to you for five minutes.

[*English*]

Mr. John Lawford (Executive Director and General Counsel, Public Interest Advocacy Centre): Thank you.

Chair and honourable members, my name is John Lawford. I'm the executive director and general counsel at the Public Interest Advocacy Centre.

PIAC is a national non-profit organization and a registered charity. We provide legal and research services on behalf of consumer interests, in particular vulnerable consumer interests concerning the provision of important public services. We've been active in the field of digital consumer protection and policy for over 20 years.

PIAC supports Bill C-294's goal of the creation of an exception to technical protection measures under the Copyright Act to allow consumers or businesses to circumvent TPMs for the purpose of attaching a further product to enhance the utility of the original consumer or business product in which the TPM is embedded.

The expression of the circumvention right in Bill C-294 covers all software-enabled products, but only to the extent that the TPM circumvention is required to make another product interoperate with the restricted product. It is aiming, therefore, at attachments or aftermarket products.

This aspect of the bill is its strength, as it limits its ambit and perhaps will not tread on the perceived rights of the initial owner's copyright or market. In other words, the primary or parent product must still be purchased by the consumer, and then the attachment or aftermarket product is permitted to read the information from the parent product to be made functional.

What this bill does not do, unlike Bill C-244, is give consumers a right to repair that furthers a number of public interest aim. These include consumer freedom and right to use their legally owned items more flexibly, the extension of useful life of products, the avoidance of consumer costs and environmental harm from needless disposal of otherwise workable products and the toxic and expensive precious minerals that are in them, and an increased control of the timing and expression of consumer demand that can lead to increased competition, consumer choice, lower prices, improved customer service, greater innovation and support of small local repair businesses.

What is not in this bill is a consumer right to be informed of the possibility and availability of replacement parts. This is required in France under their Code de la consommation, under article L111-1, which requires vendors to publicly list a product or service's functionality, compatibility and interoperability with computer programs.

Parliament would also do well to consider, as in article L111-4 of the same French law, stipulating a list of consumer electronic products that must have replacement parts available to any repairer for a period of at least five years after the sale of the last unit of the specified consumer goods.

Finally, subject to provincial jurisdiction, Parliament should consider an offence, perhaps under the Competition Act, of planned obsolescence, which is an offence under the same French law at article L441-2.

PIAC believes that consumers should have access to a wider range of interoperable products. The government's recent copyright consultation stated that interoperability "fosters competition, promotes overall business competitiveness and supports incremental innovation. Interoperability also gives consumers more ability to make the most use of the products they buy." We agree.

In order to achieve improved access to compatible goods, competing companies must be able to examine each other's software for the purpose of developing interoperable products. Currently, manufacturers use TPMs to deny competitors access to the information, preferring instead to make goods that can only be used in conjunction with other products that they manufacture in a closed loop that encourages anti-competitive lock-in.

PIAC supports adding a definition of "interoperability" in section 41.12 of the Copyright Act. In his paper, Anthony Rosborough argues for adding such a definition to the act, as allowing the term to be used in section 41.12 but leaving it undefined simply empowers original equipment manufacturers to narrowly define interoperability and to leverage the legal uncertainty with third parties to their advantage.

The definition of "interoperability" could parallel that in 17 U.S.C., section 1201(f)(4), which is "the term 'interoperability' means the ability of computer programs to exchange information, and of such programs mutually to use the information which has been exchanged." It should also be extended to include replacement physical parts, interfaces and other compatibilities as well.

● (1720)

In conclusion, we support Bill C-294 as far as it goes, but we want additional consumer protection in the area of consumer product use versus copyright overreach in the digital economy.

Thank you very much. I look forward to your questions.

[*Translation*]

The Chair: Thank you very much, Mr. Lawford.

To begin the discussion, I will turn the floor over to Mr. Patzer, for six minutes.

[*English*]

Mr. Jeremy Patzer (Cypress Hills—Grasslands, CPC): Thank you very much, everybody, for coming today. I really appreciate it, and all the testimony we've heard.

I'm going to begin with Honey Bee.

Can you give us the background for how you're seeking an equivalent exemption for interoperability as it exists in the United States?

Mr. Scott Smith (Component, Systems and Integration Manager, Honey Bee Manufacturing Ltd.): The basis of our requirements is that the agricultural equipment industry is fundamentally made up of platforms and accessories to platforms. All of the platforms are from companies outside of Canada. There are no platform manufacturers in Canada, so all Canadian business in this area is an accessory to a platform. When we're excluded from that platform, we're excluded from doing business.

The fact that our U.S. counterparts have these exemptions in their Copyright Act for the purposes that we see here puts us at a disadvantage with respect to our American counterparts.

Mr. Jeremy Patzer: Thank you.

Can you elaborate more on the unintended consequences for you and other industries of not being able to circumvent TPMs for the legitimate reasons outlined in your statements?

Mr. Scott Smith: This is a big point for us, in that the TPMs protected by the Copyright Act are empowering people—both federally and provincially, we feel—to circumvent other Canadian law. Within the Competition Act, there are regulations regarding abuse by dominant players that is enforced by technical protection measures. We cannot circumvent that as we have no way to be competitive, even with adversarial competition, because the TPMs provide such a hard lockout to doing it that we have no way to be the David against the Goliath at the federal level with respect to copyright law.

Provincially we have, in Alberta and Saskatchewan, the agriculture dealers implement act, which states that an OEM cannot enforce so-called brand purity on equipment dealers to force them to represent only one brand. The act allows for dealers to represent a multitude of brands that are all aftermarket in that case, and a large number of those would be Canadian brands.

The use of TPMs in this case circumvents the provincial acts by creating a way for them to create a technical barrier to interoperability so that even if the dealers could sell onto those brand platforms, they've technically traded the brand purity that has been prevented from being put directly into dealer contracts.

● (1725)

Mr. Jeremy Patzer: Thank you.

Mr. Dade, could you talk a little bit more about trade agreements—for example, CUSMA—as this one is where this originally came from?

Could you elaborate further on the importance that making these changes has in making sure that we're matched up with our counterparts both in the States and around the world?

Mr. Carlo Dade: The issue with the new NAFTA agreement is that we're trying to avoid U.S. imperialism here in terms of our trade agreements. The issue with the new NAFTA was something that we raised in an article we wrote for The Hill Times about five years ago when we were in the midst of negotiations.

I also spoke with the Foreign Affairs team negotiating the agreement and raised this issue with them. I asked if my hypothesis that the agreement could imperil our ability to amend copyright to fix interoperability issues would be an issue. It was something that wasn't on their radar. The response I got from Foreign Affairs.... They had all the time in the world and they did an excellent job with the negotiations, and my hat goes off to them, but the response I got was that they weren't sure. They couldn't say if it would or if it wouldn't.

In terms of the amendments that others have proposed, I think we get into the error of increasing international regulation of copyright and breaking digital locks. The Trans-Pacific Partnership agreement was an acceleration of what had been in the new NAFTA agreement, and the new digital agreement in Asia being put out by Chile, Singapore and others is another step in that direction. The Americans are pushing even harder.

This is an area of American competitive advantage. As such, the Americans are using trade agreements to ensure that they maintain competitive advantage. We're allies with the U.S., but we're also economic competitors. With the Americans, we have to keep one eye on our wallets with things like this.

Going forward, we really need to start paying more attention to this.

Mr. Jeremy Patzer: Thank you very much.

I have about 30 seconds left.

Can you elaborate really briefly on the importance of innovation, maybe from an environmental context? The header that we had growing up was a 42-footer. How big are headers now? That means fewer passes down the field.

Can you elaborate on that quickly?

Mr. Scott Smith: Today our offering goes from 25 feet up to 60 feet. The 60-foot one was developed for what's called controlled traffic. It limits the amount of vehicle traffic in a farmer's field to maximize the return on the seed that's planted. Also, the weight of the header has been reduced in order to reduce fuel consumption.

Every little aspect of this contributes to benefits. Informally, we've measured double-digit fuel savings in the work that we've done with a combination of lightweighting, long size, centrally mounted mass and making it directly mechanically driven. It's simplifying products. Taking technology out of the products has actually made them more efficient.

The Chair: Thank you very much.

Mr. Gaheer, the floor is yours.

● (1730)

Mr. Iqwinder Gaheer (Mississauga—Malton, Lib.): Thank you, Chair.

Thank you to all of the witnesses for making time for this committee.

Ms. Centivany and Mr. Rosborough, thank you again for being here. We really appreciated your testimony on Bill C-244 a few weeks ago. As we understand it, Bill C-294 raises similar concerns around Canada's obligation under CUSMA. Would you agree with this? Are there suggested amendments that you would make or that you want the committee to consider?

Mr. Anthony D. Rosborough: I'm happy to take the first crack at that question.

In some ways, your question echoes a bit the submissions from IPIC on that point.

My position is that this bill is, in many ways, consistent with Canada's obligations under CUSMA. In particular, we can look to paragraph 20.66(4)(h) of CUSMA, which is the relevant section for TPMs. It says that “a Party may provide additional exceptions or limitations for non-infringing uses of a particular class of works, performances” and so on, where “demonstrated by substantial evidence in a legislative, regulatory, or administrative proceeding in accordance with the Party’s law”. I understand what we're having here this evening to be some form of legislative or administrative proceeding.

It could be other forms of that, but the point is that if there's any sort of wiggle room in the CUSMA obligations for empowering new exceptions to TPM circumvention, the adverse effects on secondary markets is probably the most clear-cut case for why we would have that wiggle room. I can't think of a better example than the use of TPMs that are used primarily to prevent competition and the development of innovative products that follow on innovation.

My position would be that this is consistent with CUSMA and that there's not an issue.

Mr. Iqwinder Gaheer: Okay.

Ms. Centivany, do you have anything to add?

Dr. Alissa Centivany: I don't have anything to add. I'm in agreement with Anthony.

Mr. Iqwinder Gaheer: That's perfect.

I have a second question, Mr. Rosborough. You said that interoperability will increase innovation. For the record, could you expand on how it will increase innovation and how that could lead to more consumer choice?

Mr. Anthony D. Rosborough: Sure. I think there's a bit to unpack with the question.

First of all, there is interoperability permitted under the act. There's already an exception for that. The problem is that the exception that exists defines interoperability very narrowly as this process between two computer programs. It allows you to make Zoom work on your Windows machine and your Apple machine. That's the level of interoperability we're talking about.

What it doesn't permit is a much broader conception of interoperability that views technologies not just as computer programs but as integrated devices. They're cyber-physical systems or objects that are computerized. What this bill seeks to do is expand the idea of interoperability under the act to include those types of devices and products. That would enable a whole host of industries in Canada to produce products and services that would expand into new markets beyond just computer programs.

I can't provide you with numbers or evidence as to how that would increase innovation across the country, but I think it's self-evident that when we reach into new types of technologies, we will enable new types of innovation.

Mr. Iqwinder Gaheer: Thank you.

My next question is open for all witnesses.

During the study on Bill C-244, there were opposing views on the bill. OEMs were quite opposed to the right to repair frameworks for a number of reasons, including safety concerns and IP theft.

Are these issues of concern for Bill C-294 as well? What are your thoughts on this?

Mr. Scott Smith: That's a good question.

When we gave our opening statements earlier, we referred to the 4,000 members of the North American Equipment Dealers Association. These are all the companies in Canada and the United States that are impacted by restrictions on their ability to do business by being locked in to a single vendor and by restrictions on their freedom to choose what products they offer and don't offer. I think that's what's at stake here.

From a Canadian perspective, as manufacturers of that equipment, we're absolutely dependent on interoperability. If we cannot have interoperability through this legislation or other legislation that mandates it for products sold in Canada, we have to have some way to reverse-engineer to create the interoperability that's required, with the understanding that we're not interested in their intellectual property and all these things. We're asking for the external interfaces to be fully defined so that we can create this interoperability. To whatever depth we have to dig to achieve that information requirement, we need to be able to do that legally, and that's our biggest concern today.

● (1735)

The Chair: Thank you very much, Mr. Gaheer.

[*Translation*]

I now give the floor to Mr. Lemire for six minutes.

Mr. Sébastien Lemire: Thank you, Mr. Chair.

Professor Centivany, you raised a question about other types of objects and technologies that have not been addressed with the coming of the Internet.

Do you agree with Ms. Stanley that changes to the Copyright Act are not necessary? Can you elaborate on the advent of artificial intelligence and its impact on interoperability?

[*English*]

Dr. Alissa Centivany: With respect to the question regarding the testimony offered by the IP Institute of Canada, my general response would be that if the Copyright Act was clear on interoperability as it stands, then we wouldn't see so many obvious obstacles to interoperability here in Canada.

If that position is correct, then I think what we would need to do is make it really clear to follow-on innovators and others that they are free to do that kind of innovation and add-on work. What I think is that the act as currently stated is actually not sufficient to enable the kind of operability that we're discussing here today.

With regard to the question of AI, that is a really difficult question for a number of reasons, one of which is that AI is most typically a black box. We don't actually know what's happening with many of these systems. We don't know where the data is coming from, where it's being used, how it's being used or what the models are that are being applied.

What I would say is that one of the key ways in which an interoperability provision like the one proposed would help us with respect to AI would be to enable more critical research into how AI is being developed, adapted and applied so that we can make sure that as these technologies continue to be deployed in the world, they're safe and not promoting bias and other harmful social consequences.

[*Translation*]

Mr. Sébastien Lemire: Thank you.

Mr. Rosborough, do you have any comments about artificial intelligence and its impact on interoperability?

[*English*]

Mr. Anthony D. Rosborough: In some ways, what we're talking about here is a little bit of comparing apples to oranges. In the one case, it's circumventing the TPM in a physical device for the purpose of making it interoperable with another device or computer program. In some ways, that's quite distinct from circumventing a TPM that protects an algorithmic process to understand how it works for other purposes. In some ways, it's kind of apples to oranges.

You could say, on the question of AI, that there may be some positive social role for TPMs in ensuring that AI systems are not tampered with in a way that produces social harms. However, I think that's a very separate issue from the one we're dealing with today, which is really concerned with secondary markets, competition and innovation. I think that's the pure purpose and spirit of this bill, and I think that's the context in which it should be analyzed.

[*Translation*]

Mr. Sébastien Lemire: Ms. Lovrics and Ms. Stanley, how does the Intellectual Property Institute of Canada view the arrival of artificial intelligence-based technologies and computer programs in relation to the Copyright Act?

In your opinion, why has this issue not been addressed with the Americans in agreements such as the Canada-U.S.-Mexico Agreement?

[*English*]

Ms. Colleen Stanley: I don't know why the issue of AI in TPM and interoperability hasn't been raised in negotiations with the U.S., but I'm not involved in international negotiations at all.

From the perspective of how IPIC would talk about AI in the context of TPMs, it would be in terms of the safety and security risks that we flag when you put in an amendment that is far too broad. That is one of our concerns with Bill C-294. It may not be intended to be broad, but the language that's used, like “manufactured product” or "device or component", could have many unintended interpretations and consequences.

In the context of the role that AI could have in terms of security, safety, health care and the whole Internet of things, that would be the comment. It's safety and security and making sure there are not unintended consequences from a broad amendment.

● (1740)

[*Translation*]

Mr. Sébastien Lemire: How much time do I have left, Mr. Chair?

The Chair: You have about 10 seconds left, Mr. Lemire.

Mr. Sébastien Lemire: I'll come back to that.

The Chair: Thank you very much.

Mr. Masse, the floor is yours.

[*English*]

Mr. Brian Masse (Windsor West, NDP): Thank you, Mr. Chair.

Thank you to the witnesses for many repeat performances.

I think this issue really is, quite frankly, a matter of political will at this point. We've had a lot of evidence over the years presented to us.

I do want to go to the concerns that are being raised about USMCA or CUSMA or whatever you want to call it.

Ms. Stanley, walk us through what you would envision the process to be for Americans to take us to task if we pass this law.

We have lots of trade issues right now, but at the same time, they have massive subsidization and investments, and even further ones that will come in—like semiconductors and so forth—that are extra restrictions on production and access into Canada.

Let's go with the fear factor here in terms of what takes place for Canada if we pass a law like this, which obviously has protections that are different from those in the United States because of their system. It's similar to my former bill on the right to repair. It was the environmental assessment act on their side that actually made their manufacturers provide others with access to OEM materials for the aftermarket in the auto sector.

Walk us through what would happen.

Ms. Colleen Stanley: In terms of the objective of the bill, which is to take away barriers to interoperability to improve businesses like Honey Bee and other agricultural parts manufacturers, the issue is just a technical one. The current CUSMA section on technological protection measures and exceptions to them doesn't allow for non-infringing exceptions. In the way Bill C-294 is drafted, it seems that it would allow non-infringing exceptions, at least in some cases. It really gets down to a drafting issue.

I'm not talking about the broad policy issue here. It's that, as currently drafted, the bill would put us offside with CUSMA, and in particular of article 20.66.

I'd like to ask my colleague, Catherine Lovrics, if she has additional comments.

Ms. Catherine Lovrics: On the initial question, which was about what the remedy was and what the U.S. would do if we're found to be offside, I'm not sure if that's more of a political question than a legal question.

Mr. Brian Masse: I actually think it's a legal question. We constantly hear this. I think members at this point should be walked through it in terms of the process of the U.S.

Maybe you're not the best witness for this, so I don't expect that. Maybe we need a trade expert here at this point. We keep getting all this, yet we don't really have anything specific as consequences, other than straw examples or real, practical ones that you have brought that really point to specific legislation, so I don't want to put you in an unfair situation either.

Ms. Catherine Lovrics: Thank you for acknowledging that.

I do think that somebody who is an expert in trade relations really would be better suited to speak to what the remedy would be under CUSMA. I will also flag that while it's only provisionally implemented, there are similar concerns with respect to CETA, so both of those regimes should be looked at. TRIPS doesn't go quite as far, but I think TRIPS also is a treaty that should be looked at.

Picking up on my colleague Ms. Stanley's comments, I think our submissions are not that the policy objectives behind the particular bill shouldn't be.... We take no position on the policy objectives. We're saying that from a technical perspective, we had a team of very seasoned copyright lawyers looking at the wording of the bill and we had trouble reconciling how it would actually operate, given other provisions, and ultimately, from a lawyer's perspective, we were concerned that if this bill is implemented, it's going to introduce a ton of ambiguity and also be ineffective, given that this seems to take a very discrete look. It uses plain language that is out of step with the rest of the Copyright Act.

Picking up on Dr. Rosborough's comment with respect to whether or not embedded products are covered in the first place, from our perspective, that's a non-issue. If he's in fact correct that somehow computer software embedded in a product is no longer computer software, then this is moot. This whole conversation is moot because we don't trigger the TPM protections in the first place, and there is clear case law in point that computer software does include embedded software.

I think we're speaking from a technical perspective. Looking at the specific wording of the act, it seems to not achieve the objective, and there are also implications under various treaties that should be considered as wording is looked at for the purpose of further amendment.

I'm sorry to go on.

● (1745)

Mr. Brian Masse: No, no. It's very helpful.

I will wrap up here, Mr. Chair, as I know I'm running out of time.

Perhaps this committee needs some trade discussion with regard to this bill, because on this bill and others we have continually run into the accusations that we run up against USMCA or CUSMA or whatever you want to call it.

I'm very familiar with the process to go through it, but it seemed to scare us off from taking any action. Then at the same time, if that is true, perhaps we need some definitive understanding of the consequences and the process to make a political decision about a bill at this point in time, because I think we have heard enough testimony over the years.

Thank you, Mr. Chair.

The Chair: Thank you, Mr. Masse.

I'll give the floor to Mr. Dade, who wants to intervene.

[*Translation*]

Mr. Carlo Dade: I'm going to address the international trade aspect.

[*English*]

On chapter 31, you're looking at a dispute settlement claim from the Americans under chapter 31. You're already facing this with the Americans over dairy TRQs. Others have been raised.

The issue for the Americans, though, is that with their exceptions to the Digital Millennium Copyright Act that allow breaking of digital locks for certain issues in the U.S., the Americans, I would argue, have a bit more difficult case. We're asking for something that I would let the experts explain the exact nature of it, but the Americans have done something in this direction, so it's not like we're pulling something out of a hat that the Americans not only haven't seen but don't already have.

On the exact degree to which that statement holds, I think you would need to bring in intellectual property lawyers and those participating in negotiations internationally to help you work it out.

[*Translation*]

The Chair: Thank you very much.

Mr. Vis, you have the floor.

[*English*]

Mr. Brad Vis (Mission—Matsqui—Fraser Canyon, CPC): Thank you.

My first question is for Ms. Stanley.

Discussions of interoperability in Canadian copyright law often reference the Federal Court case of Nintendo of America v. King as one of the only cases in which a Canadian court has considered the technological protection measures circumvention provisions of the Copyright Act.

What did the court say in this decision? How has the court's interpretation of the Copyright Act's technological protection measures circumvention provisions affected their application as it relates to interoperability?

Ms. Colleen Stanley: I would defer to my colleague Catherine Lovrics on this question. I know that she's more familiar with that case.

Ms. Catherine Lovrics: Thanks very much, Ms. Stanley.

Thanks for the question.

First of all, I think the King case was not really about interoperability. It wasn't about homebrew cases; it was about somebody who was trafficking in pirated anti-circumvention devices and who, as part of the defence, raised that these devices theoretically—which on the facts seemed to be case—could also be used for homebrew, but the evidence was pretty clear that this wasn't what they were being used for. They were being used to reproduce infringing games.

I think that in the context of what that case was really about, that decision wasn't about interoperability; it was about somebody who was trafficking in devices that basically allowed for infringement of copyright. I think that's the first thing.

On the other thing, I think Dr. Rosborough has taken the position that the case reads in some necessity requirement to the interoperability provision, which on the facts of the case and on the decision itself I don't actually think is the case.

I'm happy to discuss that further.

● (1750)

Mr. Brad Vis: Thank you.

Ms. Lovrics, your colleague mentioned three points that we need to consider: how the act works as a whole, accounting for treaty obligations, and societal safety and security.

On the second point, accounting for treaty obligations, would it be fair to say—and I am far from being an expert on this subject—that the intention of this bill is to give American manufacturers similar to Honey Bee the capacity to do what they can already do under the copyright laws of America?

Ms. Catherine Lovrics: If the objective ultimately is to facilitate circumvention of TPMs for the sake of non-infringing interoperability, I think we can look to what our trading partners have done from a legislative as well as a regulatory perspective. Presumably, if we take a consistent approach, we would be likewise onside.

I think to look at the—

Mr. Brad Vis: Stop there. Let's stop right there. That's a really important point. We could likewise be onside.

The first point was looking at the act in the context of the entire Copyright Act, but Ms. Stanley also mentioned that some of the language is a little grey and unclear. You guys are experts on reviewing the application of copyright laws in Canada. How can we improve the language to get over your concerns about some of the grey areas in what's currently being proposed in this bill?

Ms. Catherine Lovrics: Following our appearance today, we will be providing submissions that are being finalized now. They will provide proposed language for consideration. With respect to paragraph, 41.12(1)(b) as proposed in the act, we had a lot of difficulty understanding what it means. Some readings of it suggest that reverse interoperability is what's being provided. There's no definition of “product”. There's a bunch of ambiguity in that provision.

With respect to (a), small amendments are ultimately what we would propose there, to the extent that the goal is really to be clear that, as Ms. Stanley stated, “not-so-smart devices”—

Mr. Brad Vis: Okay. Thank you. I don't mean to interrupt you, but I have very limited time. That's very helpful.

Ms. Stanley, the third point is societal safety and security. How would you define societal safety and security in the context of the Copyright Act? How should we, as legislators, view that point in the context of drafting this legislation? That in itself is a very broad statement to give members of Parliament. Right away I'm thinking, “Are we going to have equipment that doesn't work well? Is someone going to die?” Are there examples of this happening in Canada that you're aware of with your trade expertise?

Ms. Colleen Stanley: Just to be clear, I don't have trade expertise. I'm an intellectual property lawyer. I have copyright expertise.

Mr. Brad Vis: I mean trade in the context of your profession. My apologies.

Ms. Colleen Stanley: It's just one of the things we want to bring up in terms of how broad the approach is and how we would recommend more of a regulatory exception-by-exception approach, as they have in the United States. It's done through the Library of Congress. Every year they come out with a list of exceptions.

Perhaps I could just make a quick point. Everything I'm hearing about what's needed to fix this problem, which sounds like a big problem, is something you're already allowed to do under the Copyright Act. That's clear. All of the copyright lawyers on our committee agree with that.

When you're saying that they need to supply external specifications and that internal interfaces need to be fully defined, I think a lot of what might be required here is outside of the Copyright Act. The Copyright Act provides for almost everything. We could make these amendments that would make some of it clear, especially with respect to “not-smart” devices. However, if you're talking about somebody supplying you with external specifications, I think that goes to what the Public Interest Advocacy Centre was saying, which was that it's more in the realm of the competition laws and the consumer protection act.

The Copyright Act is really not blocking anything here that I can see.

● (1755)

Mr. Brad Vis: Okay.

In my remaining time, Ms. Centivany, in the context of our discussion today, would you like to comment on the statement that the copyright law is not an impediment to industry ?

Dr. Alissa Centivany: Thank you for the question.

I completely disagree. Let me give you a simple example from my own life.

I have three computers at home. I have an Apple computer, a PC and a machine that runs Linux. None of these computers talk to each other. They don't talk to each other because they can't. From a technical perspective, they were designed not to be able to talk to each other. It's the same thing with all the peripherals, connectors and things. Even the software programs don't want to connect to each other. The claim that interoperability is not a problem flies in the face of our common sense, daily experiences with technology.

I could also very quickly respond to the safety and security issues that were raised.

During my testimony on Bill C-244, opponents raised safety and security issues as well. My response with regard to interoperability is roughly the same: To the extent that safety and security are legitimate concerns, copyright law is not the right law to look to for protecting those interests. There are other laws that do that.

In addition, positioning consumers and the third party technicians, providers or follow-on innovators as threats is, I think, blatantly anti-consumer and anti-competition.

Finally, to the extent that safety and security are real issues caused by hacking or malfeasance of some kind, hackers already have sophisticated tools at their disposal to engage in those things. This bill isn't going to change that.

Perhaps I'll stop there. Thank you.

[*Translation*]

The Chair: Thank you very much.

I now give the floor to Mr. Dong for five minutes.

[*English*]

Mr. Han Dong (Don Valley North, Lib.): Thank you, Mr. Chair.

I want to thank the panellists and witnesses for their interventions. We're having a fascinating conversation.

The conversation about compliance with CUSMA is at the top of my mind, as well, but I understand my colleague already talked about that. Perhaps we'll have further discussion with another set of witnesses later on.

I want to ask you a question about the industry or class of product we should consider exempting. We heard, in previous testimonies, whether they were on Bill C-244 or this particular bill, industry coming forward and saying, "We need to be exempted from these bills."

I will start with that. It's an open question for anyone who wants to comment on it.

Go ahead, Mr. Rosborough.

Mr. Anthony D. Rosborough: My answer to that is fairly straightforward: None should be exempt.

There's no policy reason for the Copyright Act to be industry-specific for certain types of exceptions or limitations. There's no real justification for why that should be the case. Industry groups may come to you and say, "It's already been solved by an independent agreement" or "It shouldn't apply to our industry, because it will produce certain disadvantages in competition." Again, however, it's not the role of copyright policy to discriminate among the interests of different industries. The copyright law, in fact, should be operating agnostic to these types of concerns. I suggest the same approach should be taken here.

Mr. Han Dong: Thank you.

I have a follow-up question.

We heard from the medical devices industry. They said the type of products they produce and include in the market may have a direct impact on human safety and health.

What do you say to that?

Mr. Anthony D. Rosborough: I'm assuming the question was directed at me.

Mr. Han Dong: Yes, thank you.

Mr. Anthony D. Rosborough: Those considerations are certainly valid, particularly when we're dealing with sensitive information or data that could be personalized.

Again, however, I think we need to remember the role of copyright law. There's legislation for public and consumer safety outside of the Copyright Act. As one of the witnesses from the Intellectual Property Institute of Canada testified, public health and safety is not their area of expertise, nor is it the expertise of copyright policy.

Where those concerns exist, the government should take action to enact legislation that protects Canadians from dangerous products. However, I don't think the Copyright Act is the appropriate place to incorporate those considerations. What ends up happening is public interest, access to information, innovation and those types of concerns end up bearing the cost of it.

It's not the appropriate role for those types of policies.

● (1800)

Mr. Carlo Dade: If I may, on your first question, especially with the new NAFTA, the Americans, in the Library of Congress decision to exempt agricultural equipment, made a special case to prioritize agriculture. They recognized that agriculture is a different sort of industry and has different sorts of needs. In terms of the new NAFTA and worrying about the Americans, that would be a safe area.

Second, in Canada, for over 100 years, we have recognized the special role that agricultural equipment plays on the Prairies. We have over 100 years of having special requirements for ag equipment manufacturers and interventions in private sector actions in ag equipment acts in Canada.

In terms of looking not for what to exempt but for what to include, you have a strong case for agriculture, both in the U.S. and in Canadian law.

Mr. Han Dong: Thank you very much, Mr. Dade. That was very important.

Mr. Rosborough, you touched upon the consumer protection aspect of what we're trying to achieve here. I know that much of it is under provincial jurisdiction. Do you have any thoughts on what we need in terms of accompanying provincial legislation to make this thing work?

Mr. Anthony D. Rosborough: Of course federal-provincial cooperation is needed for this type of policy, because we're often dealing with products that are the subject of contract warranties.

Consumer protection, though, to answer your question, can mean a few different things. With capital "c" and "p", consumer protection law in terms of the statutes provincially will require provincial co-operation. However, there is federal legislation that speaks to consumer product safety. In fact, the federal Consumer Product Safety Act is maybe one example of how the federal government could take leadership in this direction—of course, not in the absence of provincial co-operation, but in harmony with it.

Mr. Han Dong: On this point, what role do provinces play in terms of interoperability? We talk about the consumer protection aspect, but what about interoperability? What role do you think the provincial government or legislature can play?

Mr. Anthony D. Rosborough: As I mentioned, consumer protection acts in the provinces, and other provincial legislation that deals with the sale of goods and contracts for goods and services, could be an issue when there is a contractual restriction on interoperability, as between the manufacturer and the consumer. That's an area where provincial legislation could come in to ensure that there's freedom to achieve interoperability irrespective of some contractual term to the contrary, and that a warranty might still be upheld even if the device is modified for the purposes of interoperability.

These are areas where the provinces could provide some clarity and step in to ensure that contracts for warranties or in relation to the terms of use, or for the purchase and sale of goods, would be able to accommodate these types of modifications.

Mr. Han Dong: Does anybody else want to chime in on this point?

Mr. Carlo Dade: Sure, I will, very quickly.

The agricultural equipment acts in the provinces would likely have to be updated too, so there would need to be some coordination between the federal government and the provinces. We've already started the work of informing provincial legislatures and MLAs on the Prairies about this issue.

Mr. Han Dong: Thank you, Mr. Dade.

I think Ms. Centivany has a point.

Dr. Alissa Centivany: Yes, thank you. It's a very quick point.

I think we can all recognize, both in this discussion and in the discussion on Bill C-244, that there is broad support across Canada, across industries and across partisan affiliations for these kinds of bills. While changes to the copyright law's TPM provisions are not going solve interoperability or right to repair on their own, and there will be other legal considerations at the provincial level that need to be taken into account, I see this as an opportunity for provinces to perhaps distinguish themselves in a way that is pro-innovation, pro-competition, pro-consumer. If we consider the United States, we know that California has more progressive laws and promotes positive shifts, while other states in the country may be more conservative.

I actually see this as being a really promising possibility.

● (1805)

Mr. Han Dong: It's to put together a platform for the province to compete to do some of the work.

Chair, how much time do I have left?

The Chair: You're over by three minutes, Mr. Dong, but I felt generous.

[*Translation*]

I now give the floor to Mr. Lemire.

Mr. Sébastien Lemire: Thank you, Mr. Chair.

Ms. Lovrics or Ms. Stanley, the anti-circumvention provisions of U.S. copyright law, that is, Chapter 17, paragraph 1201(f), contain an exception for interoperability purposes. How does this exception compare to the one currently in the Canadian Copyright Act, or to the expanded exception proposed in Bill C-294?

[*English*]

Ms. Colleen Stanley: Ms. Lovrics, could you address this question?

Ms. Catherine Lovrics: I'm sorry. Is it how does something compare to what's in Bill C-294, the current provisions?

[*Translation*]

Mr. Sébastien Lemire: Yes. If we compare the interoperability provisions of the U.S. law against the current Canadian law or Bill C-294, can we tie in? Will these exceptions help bring our position into line with the Canada-U.S.-Mexico Agreement?

[*English*]

Ms. Catherine Lovrics: Yes is the short answer, and we'd encourage the study of that. The U.S. provision provides for reverse engineering for the sole purpose of identifying and analyzing those elements of a program that are necessary to achieve interoperability of an independently created computer program with other programs.

Second, and apart from that exception, there's also a regulatory authority, as Ms. Stanley mentioned earlier, whereby specific exceptions can be made. For example, there's a specific exemption dealing with interoperability for jailbreaking phones, or what is called jailbreaking a phone, and it's subject to regulatory review. It's done in a manner that is compliant with our treaty obligations in subparagraph (h), which Dr. Rosborough mentioned earlier. I do think that looking at that approach is an approach that should be considered.

[*Translation*]

Mr. Sébastien Lemire: In your opinion, are the amendments proposed in Bill C-294 consistent with the Canada-U.S.-Mexico Agreement? Do you have any suggestions for wording to avoid any problems with the Americans?

[*English*]

Ms. Catherine Lovrics: Yes, following this we'll be submitting a draft possible amendment for consideration that we think would be compliant and also achieve the policy objectives as we understand them. We're proposing a small amendment to subsection 41.12(1), and then—separate and apart—adding a mechanism to permit specific exceptions to be made for components or parts, for example, in the agricultural industry that would consider specific factors. “Yes” is the short answer.

[*Translation*]

Mr. Sébastien Lemire: Thank you very much.

The Chair: Thank you, Mr. Lemire.

Mr. Masse, you have the floor.

[*English*]

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

Mr. Lawford, we have a couple of bills in front of us right now. Do you have any suggestions in terms of prioritization or any thoughts of a greater reform that we might be looking at on this?

I have my own private member's legislation, but I've chosen another bill that's in the House. We have a tabled one on the auto sector on this as well. I'm just wondering what your thoughts are, because obviously there's a problem. Three different political parties and three bills coming forth on the subject matter are a strong indication that the status quo is not acceptable.

Mr. John Lawford: The difficulty you have is that all of the bills are trying to slice this in a slightly different way, but they're complementary, I think.

In relation to the one that we're presently speaking about, from a consumer point of view I think it's going to look ridiculous if our average consumer can't go into an independent repair shop to fix their car and instead be told that no, you have to go to Chrysler to do that. That's nonsense and that has to be fixed.

To hear that homegrown editions, such as a manufacturer like Honey Bee, can't operate in Canada and are disadvantaged vis-à-vis the United States because John Deere operates there is also nonsense. That has to be fixed.

The other bill, Bill C-244, which I believe we testified on as well, is taking a bigger scope to try to aim at a general right to repair. I agree that it would be much better done inside a review of the Copyright Act in a holistic manner so that concerns from specialty IP lawyers and trade people could be addressed, but you're trying to do it through Parliament.

I think the bottom line, though, is that you're trying to say that the consumer and small business dissatisfaction with the copyright balance that was struck is strong. The only thing I would add to the mix, which I was trying to say today, is there's a whole consumer protection aspect here that's not being brought into the conversation. It's done in other countries through things like consumer protection codes at a federal level, and we just don't have that in Canada. The best place I can think to put it is in the Competition Act. I don't want to use all of your time, Mr. Masse, but I hope that answers in part your question.

● (1810)

Mr. Brian Masse: That was very good. I think I'm out of time, anyway, but that was very helpful.

Thank you, Mr. Chair. Thank you, Mr. Lawford.

[*Translation*]

The Chair: Thank you very much, Mr. Masse.

Mr. Williams, you have the floor.

[*English*]

Mr. Ryan Williams (Bay of Quinte, CPC): Thank you, Mr. Chair. Thank you to all the witnesses for being here.

Ms. Centivany and Mr. Rosborough, thank you, and welcome back to the committee. I think you're both experiencing some déjà vu, as you were here just about a month ago almost on the same topic.

I want to also delve back into the topic I raised with you both last month, which is supply shortages. Are products that are fully interoperable with each other vital to preventing or lessening the impact of the kind of supply chain shortages we've seen during COVID-19?

Dr. Alissa Centivany: Maybe I'll go first. Anthony is being polite.

Yes, with regard to supply chain shortages, there are two aspects to that. One is to have the capacity to manufacture at home, so certainly to the extent that this bill would enable secondary markets to emerge for add-on products and add-on innovation, I think this bill is critical to guard against the risks of supply chain disruption, similar to the ways in which Bill C-244 mitigated some of those problems by providing a means by which we could extend the useful life of the things that we already have.

Mr. Anthony D. Rosborough: I would just point out some of the obvious. We're currently experiencing a global shortage of microchips. There are bottlenecks in a whole host of industries, and the ability to achieve interoperability among different devices allows us to achieve new purposes and new functions for the equipment that we already have. Beyond manufacturing and innovating new products that are interoperable, this bill would also help in using more of what we have for more varying contextual purposes. To that end, I think it could aid in dealing with shortages.

Mr. Ryan Williams: Thank you very much.

Anthony, you had an amendment proposal to allow for an implied licence when you buy a product. Can you explain a little bit more about that amendment?

Mr. Anthony D. Rosborough: Currently, under proposed paragraph 41.12(1)(a), if you read the entirety of the bill, the assumption is that if you are not a manufacturer of a product or device and you're someone else—for example, a researcher or someone in the process of gathering information towards the development of a product, but you're not yet manufacturing it—you would need to own a copy of the computer program or have a licence to use it. It's not always the case that such a person would have clear ownership of the computer program or a clear licence to use it.

The proposed amendment is that a person who is in ownership of the device with the embedded computer program would have an implied licence to use it. In other words, if you have the device, you're free to make it interoperable with another, regardless of whether there is an explicit licence to own or use the computer program that it runs, if you want to put it that way.

● (1815)

Mr. Ryan Williams: Does either of you have comments to some of the defence we've seen on the language and changing the language in this bill to make it a little more clear in a legal sense?

Mr. Anthony D. Rosborough: There have been a number of different proposals as to how it could be amended, so I—

Mr. Ryan Williams: Do you agree that there needs to be more amendments to the language to make it fit the...? Do we need more legal-friendly language in terms of how...? Plain language, I guess, was one recommendation.

Mr. Anthony D. Rosborough: I think the bill would benefit from some clarity around some of the terms used in paragraph 41.12(1)(a). Particularly "manufacturer" and "product" are terms that are somewhat alien to the Copyright Act. They could deserve some attention in terms of making them gel a bit better; however, it's important that amendments to the language don't essentially deprive the bill of its purpose and effect.

To that end, I think there is some room for improvement there, but I would caution against essentially watering it down into being exactly what's already in the act.

Dr. Alissa Centivany: Is it okay if I just add one small point?

Mr. Ryan Williams: Sure, go ahead.

Dr. Alissa Centivany: I think there's always room for improvement in terms of the language of these kinds of bills. I would say that the goal we should be aiming for is not to include less plain language; I think plain language is good. We want our public law to be accessible to all members of society, and plain language helps us get there.

That said, I do agree that additional definitions could be helpful, and I think Mr. Rosborough points to that in the article that he submitted to the clerk.

The Chair: Thank you very much.

Go ahead, Mr. Erskine-Smith.

Mr. Nathaniel Erskine-Smith (Beaches—East York, Lib.): Thanks, Joel.

I appreciate the concept of plain language—although, if one wants plain language in law, they probably don't go to the Copyright Act.

I want to start with the international experience. We are coming at this in a piecemeal way. There are currently two bills before this committee. I think my colleague Mr. Masse is right that there is obviously an overwhelming desire for change and to deliver interoperability and a right to repair. It's more about how we technically go about this in order to deliver it in the best way possible.

Mr. Rosborough and Ms. Centivany, I'm going to start with you.

Is there another jurisdiction that gets this right?.

Mr. Anthony D. Rosborough: My answer would be that many jurisdictions are struggling with this issue. The jurisdictions that inherited the Digital Millennium Copyright Act treatment of TPMs as access controls are all struggling with what to do about this. There's no golden case for how it can be best approached.

However, as for the concerns about CUSMA, we've been cautioned that there's an issue with it that we need to be careful about, but what that is can't really be articulated. Personally, I don't find that very satisfactory or persuasive. Article 20.66(4)(h) of CUSMA gives us a clear path to enact new exceptions precisely like this one.

In the absence of a reason that this wouldn't fit within that framework, I think we ought to proceed on the assumption that it's consistent with CUSMA.

Mr. Nathaniel Erskine-Smith: Ms. Lovrics, is there another jurisdiction we should be looking at, somewhere, in your view?

Ms. Catherine Lovrics: As with the discussion we had on the right to repair bill, the Copyright Act has been identified as the barrier to both right to repair and interoperability. I think there's an illusion that removing, amending or broadening the exception will somehow facilitate right to repair. This act doesn't facilitate the handshake.

You could look at other jurisdictions, such as Europe, the U.K., and states in the U.S. where they've looked at other areas of the law, such as competition. There's Mr. Masse's bill under the Competition Act. You could be looking at provincial jurisdictions, and given our division of powers, there would be certain provinces. Quebec has put forward a bill.

I think we need a comprehensive approach. To me, amending the Copyright Act is a bit of a red herring, frankly.

Mr. Nathaniel Erskine-Smith: Could you pause? We're not talking about right to repair right now; we're talking about interoperability. Is the answer not...?

You know, I'm sympathetic to some of the concerns of industry. They came before us with concerns that we would create a completely open door to circumvent TPMs, and they wouldn't be able to control it. We might say it's for the purpose of repair, but it's tough.

However, in this particular case, I'm not that sympathetic, because if the industries delivered interoperability, they could still have TPMs. Doesn't this create the right incentive structure for businesses to do the damn thing they should do in the first place?

● (1820)

Ms. Catherine Lovrics: To illustrate the red herring, I'll take Ms. Centivany's point about the three different computer systems that don't speak to each other. The current exception would enable somebody to do that research to have them speak to each other. The Copyright Act is not a barrier there. That's the point I'm making.

Mr. Nathaniel Erskine-Smith: No. However, companies would instead have the incentive not to have disparate systems that don't talk to each other if we as legislators say, “Look, people are going to be able to circumvent TPMs in order to render things interoperable; therefore, if you want to keep your TPMs in place and not have such easy circumvention, deliver interoperability.”

Doesn't this create an industry incentive to deliver interoperability?

Ms. Catherine Lovrics: I would think we already have the industry incentive, and we're not seeing it.

Mr. Nathaniel Erskine-Smith: I sincerely disagree that we have any industry incentive towards interoperability. It's quite the opposite, I think.

My last question is.... You are going to provide or propose amendments to us. My ask for you, Mr. Rosborough and Ms. Centivany, is this: We're not going to have you back, as there's timing to this and everything else. It would be very helpful if, once Ms. Lovrics and her team provide amendments to us, we could circulate those around and you could comment on them in writing to the clerk and analysts. I can then at least have a better understanding. They'll make their best case, and then you can provide an answer. I would do that today, but I don't have the amendments in front of me. Making sure we get that in writing would be very helpful.

Otherwise, I appreciate everyone's time.

Dr. Alissa Centivany: I would be happy to do that.

Mr. Anthony D. Rosborough: Likewise.

[*Translation*]

The Chair: Thank you very much.

I now yield the floor to Mr. Perkins for five minutes.

[*English*]

Mr. Rick Perkins (South Shore—St. Margarets, CPC): Thank you, Mr. Chair.

I'm going to split my time with Mr. Généreux.

Mr. Lawford, in your opening presentation—this is a bit of a follow-up to Mr. Erskine-Smith—you talked about French law, French law being interesting.

How would you incorporate some of the elements you mentioned into this bill in order to achieve those ends? You talked specifically about lists.

I have a second question on the issue of planned obsolescence, which I'll come back to as a separate issue.

Mr. John Lawford: You're right. I don't think planned obsolescence would fit well into this bill, but I do think the obligations that are in the French law to tell people what is replaceable and how long it will be available on the market would be helpful here.

As long as you're not in a monopoly situation like John Deere, where only these guys, or maybe one or two other manufacturers, build what attaches to that equipment, in more consumer product areas, such as the smart home, you might have a choice of three, four or five smart home providers. At the moment, we don't know what they're going to support or how to replace the pieces if they break in these systems. Consumers can't be sure that they won't pick a system that is quickly outdated and doesn't work. Then they have to replace the whole system.

Having a little bit of information at the front end about replacement parts and being allowed to do that would seem to be complementary to what this bill is trying to do, and to some extent Bill C-244.

Mr. Rick Perkins: How do you take that to the next step? What does that look like? Is the manufacturer responsible, through their website or whatever, for keeping an up-to-date list? Do the people who provide those parts and systems have to get approval of that manufacturer in order to do that? How does that work?

Mr. John Lawford: If I understand correctly, the manufacturer has to make an obligation to try to support the third parties, but they are not required to. If they are producing their own parts, I think they have to continue to make them available for five years beyond the time the product is first offered to the public. After that, it gets hazy to me.

I understand that the concern might be over-regulation. I agree that there is some point at which we want to make this reasonable. The idea is that you're going to tell people what your intentions are for the repairability of the product up front.

● (1825)

Mr. Rick Perkins: It's over to you, Mr. Généreux.

[*Translation*]

Mr. Bernard Généreux (Montmagny—L'Islet—Kamouraska—Rivière-du-Loup, CPC): Ms. Centivany and Ms. Stanley, there is more and more talk about new artificial intelligence technologies such as ChatGPT and all the similar software to come.

How will, can or should copyright or Canadian or international copyright law evolve in relation to interoperability with respect to these new technologies, which would allow a company like Mr. Pegg's to write a program to run equipment in 20 minutes?

How do you see all this evolving in relation to the society we live in today and in relation to copyright? Do you see a connection in all this? Am I too far ahead of my time?

[*English*]

Dr. Alissa Centivany: I'll respond first, if that's okay.

Yes, you might be ahead of your time.

I would say a couple of things. As a general matter, copyright law has always struggled with new and emerging technologies. Part of the reason is that copyright law is inherently retrospective. It's backward-looking. It's oriented around precedent and analogizing and distinguishing to things that have come before. The nature of emerging technology is that it's forward-looking. It's innovative. It throws us into new and unanticipated kinds of situations.

I would say there's always a tension between copyright and emerging technology. Figuring out how to recalibrate the balance every time an innovative or disruptive technology comes along is always a challenge, whether it's the player piano or whether it's AI.

With AI specifically, the copyright issues have not been borne out yet. I think a lot of it comes down to how the data that's being used in these processes is oftentimes protected and the outputs are oftentimes potentially infringing. That's sort of the area where as a researcher I look at copyright implications of AI. That doesn't necessarily tie into interoperability, aside from the issues around whether researchers are able to analyze these technologies, as I mentioned earlier.

[*Translation*]

Mr. Bernard Généreux: Ms. Stanley, do you have any comments?

[*English*]

Ms. Colleen Stanley: If I perceived your question correctly, it's about interoperability and how it would relate to AI going forward.

If you're looking at AI, it's really the same issue that we have here today. Whether it's software that enables an AI interface or software that enables an operating system for a tractor, it's still software and it's protected under the Copyright Act. There are these exceptions for interoperability and for breaking TPMs to make them interoperable.

In the case of AI, the approach that IPIC recommends for addressing the objectives here would also apply to addressing issues with respect to circumventing TPMs for AI in that you would have to make sure that it makes sense in the context of the copyright. You would also have to have an eye to safety and security concerns, I think, especially with respect to AI.

The approach we're advocating is something that's more akin to what the U.S. has with the Library of Congress and enumerated exceptions. It's something that takes a case-by-case look at each exception that is enacted under the Copyright Act.

[*Translation*]

Mr. Bernard Généreux: Mr. Chair, I believe Mr. Dade would like to speak, if you will allow it.

[*English*]

Mr. Carlo Dade: We're getting ahead of ourselves. This gets to the question from the honourable member from Beaches—East York.

Your hand is going to be forced. You're already talking about how we deal with things that were negotiated in the new NAFTA agreement and how we deal with things that were negotiated in the TPP.

Canada is in the process of considering—

● (1830)

[*Translation*]

Mr. Sébastien Lemire: Mr. Chair, there is no interpretation.

The Chair: Wait a moment please.

Mr. Carlo Dade: Can I continue?

Mr. Sébastien Lemire: Please do. We had lost the French interpretation.

Mr. Carlo Dade: I see. I will continue in English.

[*English*]

Canada is in the process of considering entering negotiations on the DEPA, the Digital Economy Partnership Agreement that's coming out of Asia. You're going to have your hand forced. If you do not hand Canadian negotiators a set position in Canadian law when they enter these negotiations, they are in the weaker position to argue for and defend Canadian interests.

What you're doing is not getting ahead of the curve. You're preparing Canada to be able to defend its interests in these negotiations like the DEPA and to avoid having to come back to this committee, wondering how we deal with obligations we've made in the DEPA and other agreements.

[*Translation*]

The Chair: Thank you.

Mr. Erskine-Smith, you have the floor for five minutes.

[*English*]

Mr. Nathaniel Erskine-Smith: Thanks.

We're going to have a further conversation, I think, at this committee around ensuring compliance with CUSMA. Obviously, it applies to Bill C-244 as well. It's been a more challenging conversation for this bill as well.

To Mr. Rosborough's point, as I understand it, you mentioned article 20.66(4)(h). However, article 20.66(4)(a) says:

> non-infringing reverse engineering activities with regard to a lawfully obtained copy of a computer program,

Okay. Check.

> carried out in good faith with respect to particular elements of that computer program that have not been readily available to the person engaged in those activities, for the sole purpose of achieving interoperability of an independently created computer program with other programs

One would think.... The fact is that interoperability is clearly marked out here as an exception. You then have the basket clause in paragraph (h) that you pointed to.

I guess the question is not for you, Mr. Rosborough, but for Ms. Lovrics or your colleague.

Given articles 20.66(4)(a) and 20.66(4)(h), so that I'm better prepared to ask the question when we have a trade expert in front of us, how should I understand a CUSMA objection in the course of Bill C-294?

Ms. Catherine Lovrics: I'm not sure.

Colleen, do you want to take this one?

I would first point out the deletion of “sole”. I'm not in the room—I'm sorry—and I can't see if....

Ms. Colleen Stanley: The deletion of “sole” in the....

Do you want to take this one?

Ms. Catherine Lovrics: Sure.

I think ultimately it will depend largely on where the language lands. Dealing first with proposed subsection 41.12(1), the deletion of “sole” may in and of itself bring us offside on the provision. Proposed paragraph 41.12(1)(b), as worded grammatically, arguably provides for reverse interoperability. The language is just unclear.

Given the ambiguity, depending on how it's applied, I think there is a risk that proposed paragraph 41.12(1)(b) goes beyond it, and that it goes potentially beyond (h). Our view is that we would prefer a regulatory approach to a legislative approach. I take Dr. Rosborough's position that this is a legislative process we're undertaking, but to our mind—

Mr. Nathaniel Erskine-Smith: One might prefer a regulatory approach. That's fair. I'm sympathetic to the idea of a regulatory approach. If the government put forward a comprehensive regulatory approach that checked a lot of these boxes and checked some of the boxes Mr. Lawford's been talking about, I'm open to that suggestion, but we have what we have in front of us, and I'm hearing that there are objections based on CUSMA. I doubt that the word “sole” ultimately upends the whole thing.

I take your point that (b) doesn't fully fall within the exception for proposed paragraph 41.12(1)(a), but you'd think that there's a pretty good argument that 4(h) in CUSMA would encompass it, given we're really talking about the same thing and that proposed paragraph 41.12(1)(a) is already there, so interoperability is already there as a premise. It's already there as an exception.

On this, what would be helpful for my purposes, rather than going back and forth in this short time, we are going to I think be engaging trade experts in this space, so if you were to follow up in writing with the core.... The questions have to be framed in some way. It would be nice to be fully prepared so we can have a thorough conversation with those trade experts and make sure all concerns are properly addressed in full. I think Mr. Rosborough made a pretty compelling case around proposed paragraph 41.12(1)(a) and CUSMA's 4(h), so if you're not satisfied, then putting those concerns and that lack of satisfaction in front of a trade expert would be helpful for us.

Ms. Catherine Lovrics: Sure. Just to be clear, I think our primary concern is actually inconsistency within the context of the Copyright Act itself—

● (1835)

Mr. Nathaniel Erskine-Smith: I get it, and you'll have amendments for us on that.

Ms. Catherine Lovrics: Yes.

Mr. Nathaniel Erskine-Smith: Perfect.

Thanks, everyone.

[*Translation*]

The Chair: Thank you very much, Mr. Erskine-Smith.

Mr. Lemire, you have the floor for two and a half minutes.

Mr. Sébastien Lemire: Thank you, Mr. Chair.

Ms. Lovrics or Ms. Stanley, with respect to artificial intelligence, should the notion of a transparency requirement be included now to address concerns about it, including those raised by Professor Centivany?

The literature on artificial intelligence proposes that its productions should follow a path similar to that of photography and be seen as the product of a tool, not as works. Can you give us your views on this? Should there be an obligation of transparency?

[*English*]

Ms. Colleen Stanley: I'm not sure I understand your question. Is it an obligation for transparency in...?

[*Translation*]

Mr. Sébastien Lemire: In my understanding of artificial intelligence, it will sometimes be the source of reproductions of works, which will then be new works. Is there an obligation to trace and name the original work? Should there be some form of copyright compensation if artificial intelligence distorts the original work? Is that what we should do?

[*English*]

Ms. Colleen Stanley: This isn't related at all to this topic. I don't see the relation. AI creation of copyright-protected works and the extent that they draw on other works or whether they're transformative works is the topic of a lot of copyright conferences right now. I would say I don't really think there's any clear consensus in copyright law at all on that right now.

Ms. Lovrics, did you have anything further on that?

Ms. Catherine Lovrics: Yes, I agree. To the extent that the question really relates to either what exceptions are made for clearance for inputs, which is one of the points that Professor Centivany made, or protections for outputs, or what the infringement analysis should be with respect to outputs vis-à-vis the inputs, is a whole separate issue. In fact, when the government ran a consultation, we provided submissions related to many of those issues, but it seems to be outside the context here.

To the extent that interoperability and this enabling circumvention of TPMs to allow for two computer programs to speak to each other may result in access to code that otherwise is a trade secret or an algorithm that is inside the black box, arguably, given the scope of the current exception at least, and given the way infringement works and how everything is subject to infringement, there are protections from a copyright perspective, but there may be bigger issues to consider there from a trade secrets perspective, as well as a disincentivization with respect to investment in the AI industry, which is huge in Canada, obviously.

I'm not sure if that was what you were trying to get at, but in the context of this bill, that's to me the closest analogue in the AI industry.

If part of the question is just how robust our AI industry is in Canada and whether or not it may actually facilitate interoperability between two computer systems and develop code that allows for two computer systems to speak to each other, that's for a technologist to speak to, but I do think we're well positioned in Canada from an innovation perspective in that space.

That's me speaking personally, and not necessarily on behalf of IPIC.

[*Translation*]

Mr. Sébastien Lemire: Thank you very much for your comments.

The Chair: Thank you very much.

Mr. Masse, you have the floor.

[*English*]

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

Ms. Centivany, you gave a good example about the computers. You have three different systems that aren't able to talk to each other. Do you have another example that might be helpful for the committee? I think that's a really good one in terms of what we see in our daily lives. Do you have another one you can provide?

Dr. Alissa Centivany: I have so many examples, unfortunately.

Another example that I think resonates with a lot of people is the example of consumables with, for example, HP inkjet cartridges. You buy an HP inkjet printer. It's a good deal. Then what ends up happening is TPMs are used to basically prevent third party inkjet cartridges from being used easily. In fact, I read a comment just yesterday that one litre of inkjet toner is more expensive than one litre of Chanel perfume, so we can see the ways in which companies are locking in consumers and then essentially making them pay to continue to be able to use their stuff.

● (1840)

Mr. Brian Masse: That's a really good one too. I think this also touches upon the environment. You literally have printers that are almost disposable in terms of economics, because for about the same price as cartridges, you could basically buy another printer and then have the cartridges included and so forth, so there's another level to this that I don't think we've gone into.

I know my time's up, but I think those practical examples are really good.

Thank you, Mr. Chair.

The Chair: Thank you very much, Mr. Masse.

To conclude this discussion, Mr. Patzer, the floor is yours.

Mr. Jeremy Patzer: Thank you very much.

I'm going to go back to the folks from Honey Bee. We heard comments earlier about an industry incentive for interoperability. In your view as innovators, is there an industry incentive for interoperability that currently exists?

Mr. Scott Smith: As I have been listening today, I have been trying to frame what I'm hearing within the context of our reality. A couple of things have stuck out.

One is that the void left by the lack of interoperability is filled with anti-competitive behaviour and planned obsolescence, because the people who live in that void have the ability to decide how everything goes after that. They hold a very strong position.

From a business perspective, for our industry and all industry in Canada, when we look at the copyright law and how it's impacting our ability to build farm equipment, it seems just weird at the outset. We're really concerned about this and we're not taking the legal and financial risk of making innovations commercially available, because we risk Nintendo versus King types of fines—$12-million fines. King was a little guy with a little thing. Relative to him, we're big guys with big things, so that's concerning.

With regard to the language that needs to be used and using plain language or legal language, industry is asking for clear language so that we have a clear understanding of where we stand with respect to these laws and so that we can also pursue provincial laws that are in support of our industries once we know where we stand federally. Today we don't know where we stand federally, given the lack of clarifying language. The bill presents this clarifying language to a point that we're very comfortable with, which would leave us to pursue our innovations and other opportunities. That would be the incentive.

Mr. Jeremy Patzer: As far as some of the barriers go, the Copyright Act is premised on the whole point of ownership and/or licence. We don't own the software of any of the OEM machines. In fact, as a farmer, if I buy a combine right now, I don't own the software inside the machine I own. Is that not part of the issue for you guys as well?

Mr. Scott Smith: Software is only 30% of the issue we face with respect to interoperability, so it would solve only 30% of the issue. This law covers other forms of technical and digital locks that prevent interoperability —potentially unintentionally, I would say— that hurt us.

Mr. Jeremy Patzer: Maybe just keep elaborating on that, because I think we need to get a very clear and plain picture of what that is. You can use the rest of my time on that if you want.

Mr. Scott Smith: Interoperability is between two physical systems. There has to be a “cyber” for a physical-cyber system to exist. When there is no cyber, it's just physical-physical, physical-technical or physical-electrical. There are all kinds of circuits that exist, beyond ones that contain software.

When we looked at ones that contain software and at the Copyright Act, we were trying to imagine, through legal discussions with others, how this would work. Would we have to buy a million-dollar combine from a dealer, make our adaptation to that, then sell it as a package to the farmer, so we can have ownership of the software at the time we make the adaptation, or do we circumvent all the systems on the product and create our own parallel system? We've done that in the past, at great expense, but we're then spending all our innovation money on adaptations instead of innovation. That's not profitable for the company, nor is it interesting to the customer. Who wants to buy a product that's been hacked and chopped to get the resulting thing?

I think the better solution is this: Our long-term goal is to somehow have a mandate for interoperability. If we don't have that, the void will be filled by monopoly, planned obsolescence, and the death of the short-line industry and other industries that are add-ons to platform holders. If gatekeepers at the platform....

We're talking about walled gardens versus Sherwood Forest. We would prefer to operate in the competitive environment of Sherwood Forest and have access to those market opportunities, without even having to go into the garden. Let them have their garden, but let us also participate—those of us who want to live and work outside the garden—using those platform devices.

● (1845)

[*Translation*]

The Chair: Thank you very much, Mr. Patzer.

I want to thank all of our witnesses for attending this meeting and giving us their time.

That's all the time we have for today.

I also thank the interpreters, analysts, clerks and all the support staff.

The meeting is adjourned.