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Bill C-11: An Act to amend the Copyright Act

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Legislative Summary of Bill C-11

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Notice: For clarity of exposition, the legislative proposals set out in the bill described in this Legislative Summary are stated as if they had already been adopted or were in force. It is important to note, however, that bills may be amended during their consideration by the House of Commons and Senate, and have no force or effect unless and until they are passed by both houses of Parliament, receive Royal Assent, and come into force.

Any substantive changes in this Legislative Summary that have been made since the preceding issue are indicated in **bold print**.

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LEGISLATIVE SUMMARY OF BILL C-11: AN ACT TO AMEND THE COPYRIGHT ACT

1 BACKGROUND

Bill C-11, An Act to amend the Copyright Act, was introduced in the House of Commons by the Minister of Industry, the Honourable Christian Paradis, and received first reading on 29 September 2011.¹ The bill is a reintroduction of Bill C-32, which was introduced in the 3rd Session of the 40th Parliament.² Bill C-32 had received second reading and had been referred to a legislative committee of the House of Commons which heard witness testimony on the bill until the 40th Parliament was dissolved in March 2011.³

The bill adds new rights and exceptions to the *Copyright Act*.⁴ As noted in the bill's summary, the objectives of Bill C-11 are to:

- update the rights and protections of copyright owners to better address the challenges and opportunities of the Internet, so as to be in line with international standards;
- clarify Internet service providers' liability and make the enabling of online copyright infringement itself an infringement of copyright;
- permit businesses, educators and libraries to make greater use of copyright material in digital form;
- allow educators and students to make greater use of copyright material;
- permit certain uses of copyright material by consumers;
- give photographers the same rights as other creators;
- ensure that [the *Copyright Act*] remains technologically neutral; and
- mandates a review of [the *Copyright Act*] by Parliament every five years.

Whether the bill will achieve these objectives is a subject of debate amongst the various stakeholders affected by copyright reform, including authors, artists, musicians, record labels, book publishers, collective societies, libraries, museums, school associations, software developers, retailers, and consumers.

1.1 COPYRIGHT LAW IN CANADA

Copyright is a legal term describing rights given to creators for their literary and artistic works.⁵ Copyright attaches to an original work that is fixed in some material form. In other words, copyright protects the expression of an idea or intellectual creation; it does not protect the idea itself.

Canadian copyright law descends from two sources: English "copyright" (in the simplest terms, the economic "right to copy"), and the French "droit d'auteur," which is more comprehensive.⁶ In Canada, copyright is a purely statutory right and based solely on the provisions found in the *Copyright Act* ("the Act"). The Act affords the author of a work the right to authorize or prohibit certain uses of his or her work and to receive compensation for its use. The purpose of the Act, like that of other pieces of intellectual property legislation, is to protect copyright owners while promoting creativity and the orderly exchange of ideas.

There are two types of rights under copyright. Economic rights allow the rights owner to derive financial reward from the use of his or her works by others. Moral rights allow an author to protect the integrity of his or her work from prejudicial alterations and to be associated with the work as its author by name or under a pseudonym or to remain anonymous. Copyright and moral rights in works (including the term of copyright) are set out in Part I of the *Copyright Act*.

Copyright applies to all original literary, dramatic, musical and artistic works. Each of these general categories covers a wide range of creations, including:

- literary works: books, pamphlets, poems, other works consisting of text and computer programs;
- dramatic works: films, videos/DVDs, plays, screenplays and scripts;
- musical works: compositions that consist of both words and music, or music only (note that lyrics without music fall into the literary works category); and
- artistic works: paintings, drawings, maps, photographs, sculptures and architectural works.

As well, Part II of the Act contains provisions for neighbouring rights, consisting of copyright protection for three categories of works that fall under “other subject matter”:

- performers’ performances: performers such as actors, musicians, dancers and singers have copyrights in their performances;
- sound recordings: makers of recordings, such as records, cassettes, and compact discs (referred to as “sound recordings” in the *Copyright Act*), are also protected by copyright; and
- communication signals: broadcasters have copyrights in their broadcasted communication signals.⁷

As detailed below, Bill C-11 proposes expanding protection of neighbouring rights in order to enable ratification of the *World Intellectual Property Organization Performances and Phonograms Treaty*.

The *Copyright Act*, and most copyright laws internationally, provide that the author or rights holder has the right to authorize or prevent certain acts in relation to a work. Generally speaking, the rights holder of a work can prohibit or authorize:

- its reproduction in various forms, such as printed publications or sound recordings;
- the distribution of copies;
- its public performance;
- its broadcasting or other communication to the public;
- its translation into other languages;
- its adaptation, such as a novel into a screenplay.⁸

An author may assign any or all of these economic rights to a third party, who then becomes a copyright holder. Moral rights cannot be assigned but they can be waived by the author.

Copyright does not continue indefinitely. The law provides for a period of time during which the rights of the copyright owner exist. In Canada, and in many other countries, the duration of copyright is as a general rule the life of the author plus 50 years after the author's death, with some common exceptions. For example, the term of copyright for posthumous works, anonymous works and movies is 50 years from publication. There is a trend in a number of countries toward lengthening the duration of copyright. Indeed, the European Union, the United States and several other countries have extended the basic term of copyright to 70 years after the death of the author.

Part III of the *Copyright Act* addresses infringement of copyright and moral rights as well as exemptions and exceptions to copyright protection. The Act provides that any "fair dealing" with a work for purposes of private study or research, or for criticism, review or news reporting is not infringement. However, in the case of criticism, review, or news reporting, the user is required to give the source and the author's, performer's, sound recording maker's or broadcaster's name, if known. The line between fair dealing and infringement is a thin one. There are no guidelines that define the number of words or passages that can be used without permission from the author. Only the courts can rule whether fair dealing or infringement is involved. In addition to fair dealing, the *Copyright Act* has exceptions for different categories of users. In some cases non-profit educational institutions may make copies and perform works and other subject matter protected by copyright, free of charge, in the classroom, subject to certain restrictions and licensing requirements. In limited circumstances, non-profit libraries, museums and archives may copy published and unpublished works protected by copyright in order to maintain and manage their collections, provided that the works are not commercially available. Organizations acting for the benefit of persons with a "perceptual disability" can copy a work protected by copyright in alternate formats such as Braille, talking books or sign language.

In *CCH Canadian Ltd. v. Law Society of Upper Canada*,⁹ the Supreme Court of Canada held that the fair dealing provision of the Act (section 29), as well as related exceptions, "is a user's right. In order to maintain the proper balance between the rights of a copyright owner and users' interests, it must not be interpreted restrictively."¹⁰ As there is no definition for what is "fair," the Court enumerated six factors that provide a "useful analytical framework to govern determinations of fairness in future cases":¹¹ (1) the purpose of the dealing; (2) the character of the dealing; (3) the amount of the dealing; (4) alternatives to the dealing; (5) the nature of the work; and (6) the effect of the dealing on the work.¹²

As detailed below, Bill C-11 proposes expanding the "fair dealing" exception found at section 29 of the *Copyright Act* to include education, parody and satire. As well, Bill C-11 proposes amendments to the exceptions available to educational institutions, libraries, museums, archives and persons with a "perceptual disability" in order to facilitate the use of digital technologies and make the provisions more technologically neutral.

Violation of copyright rights through the unauthorized use of a copyright constitutes infringement. Part IV of the Act details the civil and criminal remedies for copyright infringement. Possible remedies include: awards for damages and/or lost profits or royalties, injunctions, fines, and imprisonment, depending on the nature of the infringement.

1.2 COPYRIGHT AND INTERNATIONAL TREATIES

1.2.1 INTERNATIONAL TREATIES ACCEDED TO OR RATIFIED BY CANADA

International treaties on copyright¹³ have been central to the development of copyright law in Canada. The *Copyright Act* of Canada is not enforceable outside Canada's borders. However, international conventions and treaties expand the rights of Canadian creators to the territories of other member countries and include enforceable penalties for copyright infringement. International treaties on copyright are ratified and implemented through legislative amendment to the Act when necessary. Canada has ratified or acceded to a number of international treaties addressing copyright.¹⁴ Unless otherwise specified, these conventions are administered through the World Intellectual Property Organization (WIPO):

- *Berne Convention for the Protection of Literary and Artistic Works*¹⁵ (concluded in 1886 and subsequently amended): The Berne Convention sets minimum standards of protection for authors of literary, dramatic, musical and artistic works. It also defines the scope and duration of protection.
- *Rome Convention, 1961: International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations*¹⁶ (concluded in 1961): This international convention allows Canadian performers and sound recording producers to be eligible to receive royalties when their works are performed or broadcast in member countries.
- *Agreement on Trade-Related Aspects of Intellectual Property Rights* (TRIPS Agreement)¹⁷ (concluded in 1994): This agreement was concluded through the World Trade Organization (WTO) and came into force in 1996. All WTO member countries, including Canada, are bound by the provisions of the TRIPS Agreement.
- *North American Free Trade Agreement* (NAFTA) – Chapter 17: Protection of Intellectual Property Rights¹⁸ (concluded in 1992).

In addition, copyright is also frequently included in bilateral trade agreements.

1.2.2 THE WIPO INTERNET TREATIES

Canada participated in the 1996 Diplomatic Conference on Certain Copyright and Neighboring Rights Questions that led to the creation of the two World Intellectual Property Organization Treaties dealing with copyright in the digital era, the *WIPO Copyright Treaty*¹⁹ (WCT) and the *WIPO Performances and Phonograms Treaty*²⁰ (WPPT). The treaties, known together as the "WIPO Internet Treaties" came into force in 2002. Canada signed the treaties in 1997, but has not yet ratified them. Much of the rationale for copyright reform is to enable ratification and implementation of these two treaties.

The WCT is a special agreement under the previously ratified Berne Convention. The WCT deals with protection for authors of literary and artistic works, such as writings and computer programs, original databases, musical works, audiovisual works, works of fine art and photographs. The WPPT, on the other hand, protects certain “related rights” (that is, rights related to copyright), being the rights of performers and producers of phonograms (sound recordings). The WPPT establishes copyright protection for performers and makers of sound recordings of performances similar to that granted the authors of other works.

As noted by the International Bureau of WIPO, perhaps one of the most significant contributions of the WCT and the WPPT is their recognition of the rights of authors, performers and phonogram producers to authorize the online transmission of their works, fixed performances and phonograms, as the case may be.²¹ The WCT and WPPT provide that authors, performers and producers of phonograms must be granted exclusive rights to authorize the making available of their works, performances fixed on phonograms and phonograms, respectively, by wire or wireless means, in such a way that members of the public may access those works, performances and phonograms from a place and at a time individually chosen by the members of the public (that is, interactive, on-demand services). The WPPT provides this right as a “right of making available to the public” while the WCT includes it in the provision on a general right of communication to the public.

As well, both WIPO Internet Treaties create an exclusive right for authors, performers and phonogram producers to authorize the making available to the public of originals and copies of works through sale or other transfer of ownership, that is, an exclusive right of distribution often referred to as “first distribution rights.”²² Note that the distribution right applies to tangible goods, such as copies of a CD.

Additionally – and this has become one of the most contentious issues in debates surrounding copyright reform – the WIPO Internet Treaties stipulate that Contracting Parties must create legislation to prevent the circumvention of a technological protection measure. As well, Contracting Parties must provide remedies to prevent the alteration and removal of rights management information used to identify a work and track subsequent use of the work.²³ Legal protection and remedies to prevent circumvention are now commonly called anti-circumvention laws.

1.2.3 CONSTRAINTS ON LIMITING COPYRIGHT: THE THREE-STEP TEST

The three-step test is a clause that is included in several international treaties on intellectual property, first added as article 9(2) of the Berne Convention in 1967.²⁴ It imposes on signatories to the treaties constraints on the possible limitations and exceptions to exclusive rights under national copyright laws. In other words, the three requirements of the test must be satisfied before exceptions to copyright (such as fair dealing exceptions) can be justified. Limitations on and exceptions to copyright must be limited to “certain special cases” (the first step), should “not conflict with a normal exploitation of the work” (the second step), and should “not unreasonably prejudice the legitimate interests of the author” (the third step). Variants of the three-step test are found in article 13 of TRIPS, article 10 of the WCT and article 16 of the WPPT.²⁵

During hearings on Bill C-32, some witnesses appearing before the committee proposed that the language of the three-step test be incorporated into the *Copyright Act*, while others suggested that proposed amendments expanding the fair dealing provisions of the Act could violate the three-step test.²⁶

1.2.4 ANTI-COUNTERFEITING TRADE AGREEMENT NEGOTIATIONS

In October 2007, the Government of Canada announced that it would participate in discussions towards an Anti-Counterfeiting Trade Agreement (ACTA). The objective of the ACTA is to put in place international standards for enforcing intellectual property rights in order to fight more efficiently the growing problems of counterfeiting and piracy. ACTA negotiating partners, a group which includes, along with Canada, Australia, the European Union and its member countries, Japan, Korea, Mexico, Morocco, New Zealand, Singapore, Switzerland, and the United States, concluded negotiations in October 2010 and completed the legal verification of the ACTA text in April 2011. The agreement covers three areas: improving international cooperation, establishing best practices for enforcement, and providing a more effective legal framework.²⁷

On 30 September 2011, the Honourable Ed Fast, Minister of International Trade and Minister for the Asia–Pacific Gateway, signed the ACTA. As noted in a press release, following the signature of ACTA, the Government of Canada will develop and introduce the necessary legislation to implement the agreement.²⁸ The agreement will enter into force following its ratification by six parties.

The finalization of ACTA negotiations is relevant to copyright reform insofar as Canadian copyright law must be consistent with any international intellectual property obligations to which Canada is agreeing. In its news release, the Department of Foreign Affairs and International Trade noted that Bill C-11 “informed and guided Canada’s approach to the ACTA negotiations.”²⁹

1.3 COPYRIGHT REFORM IN CANADA

The last time the *Copyright Act* underwent significant amendment was in 1997 with the enactment of an earlier Bill C-32. Changes to the law in 1997 included the addition of neighbouring rights protections for performers and producers of sound recordings and broadcasters, a private copying regime, the introduction of a statutory damages regime, as well as the introduction of a number of new but limited exceptions.³⁰ These amendments came at a time when the evolving digital revolution, with its rapid changes in technologies, made it difficult to predict the directions new technologies would take. For example, inexpensive digital music storage devices and commercial music downloading websites had yet to be invented. In order to gauge the effectiveness of the 1997 amendments, section 92 of the Act mandated a review within five years of the proclamation of the changes.

In December 2001, legislation was introduced to amend Canada’s retransmission regime for over-the-air broadcast signals in the *Copyright Act*.³¹

In 2002, Industry Canada and the Department of Canadian Heritage, which are jointly responsible for copyright policy in Canada,³² produced a report on the five-year review entitled *Supporting Culture and Innovation: Report on the Provisions and Operations of the Copyright Act*.³³ This report identified 40 issues for possible legislative action, organizing them according to whether they should be dealt with in the short term, medium term or long term.

On 25 March 2004, the Minister of Canadian Heritage and the Minister of Industry jointly submitted a *Status Report on Copyright Reform*³⁴ to the Standing Committee on Canadian Heritage. The committee reviewed the status report and held a series of meetings to consider six short-term issues, namely private copying and ratification of the WIPO Internet Treaties; photographic works; Internet service provider liability; use of Internet material for educational purposes; technology-enhanced learning; and inter-library loans.

In May 2004, the committee released its findings and nine recommendations in its *Interim Report on Copyright Reform*.³⁵ Among other things, the committee recommended that:

- the Government of Canada ratify the WIPO Internet Treaties immediately;
- the Act be amended to grant photographers the same authorship rights as other creators;
- the Act be amended to allow for an extended licensing regime for Internet material used for educational purposes;
- the Government of Canada put in place a regime of extended collective licensing to ensure that educational institutions' use of information and communications technologies to deliver copyright-protected works could be more efficiently licensed; and
- measures be taken to license the electronic delivery of copyright-protected material and to ensure the orderly and efficient electronic delivery of such material to library patrons for the purpose of research or private study. The committee also recommended that, where appropriate, the introduction of an extended collective licensing regime should also be considered.

1.3.1 LEGISLATIVE HISTORY OF COPYRIGHT BILLS

In March 2005, the Ministers of Industry and Canadian Heritage jointly released the *Government Statement on Proposals for Copyright Reform*,³⁶ which outlined proposals for a bill the government planned to table in the spring of 2005. This bill, C-60, was finally tabled on 20 June 2005.³⁷ Bill C-60 died on the *Order Paper* after the dissolution of Parliament on 1 December 2005 for the January 2006 election.

Around the time of the election, in late 2005 and early 2006, two copyright-related reports were published by Industry Canada. The first report examined the economic impact of reforming Canada's private copying regime.³⁸ The second report examined the economic impact on Internet service providers in Canada of the "notice-and-notice" regime whereby the providers send a notice to a possible copyright infringer after receiving a claim from a copyright holder.³⁹

In May 2007, Industry Canada released a study investigating the effects on music sales of music downloading;⁴⁰ the study did not find a connection between the downloading and sharing of music online and decreased sales volume of music CDs in Canada.

In June 2007, changes were made to the *Criminal Code* to criminalize the recording of movies in a movie theatre for commercial purposes to prevent movie piracy on the Internet, which arguably affects the profits of copyright holders that rely on time-limited exhibition and distribution of copyrighted works.⁴¹

In the Speech from the Throne opening the 2nd Session of the 39th Parliament in October 2007, the government emphasized that improved protection for intellectual property rights and copyright reform would be an important issue for Parliament. Bill C-61, An Act to amend the Copyright Act, was placed on the *Notice Paper* on 7 December 2007, but the bill was not introduced in the House of Commons until 12 June 2008.⁴² It was thought that one of the reasons for the delay was vocal concern over proposed provisions for the protection of digital works that may be similar to those found in American copyright legislation and that are generally thought to unduly limit the rights of users of copyrighted works. Provisions similar to those found in the U.S. law are commonly called DMCA-style laws, in reference to the *Digital Millennium Copyright Act*,⁴³ which amended the *U.S. Copyright Act* in 1998 in order to ratify the WIPO Internet Treaties.

Bill C-61 was met with mixed reviews.⁴⁴ It received the support of record labels and some content creators, but claims were also made that it had been developed with insufficient public consultation and that it gave the appearance of being the result of heavy lobbying by American media industries to replicate the DMCA. As well, it was criticized for containing an anti-circumvention clause making it illegal to break digital locks on copyright material. At the heart of the concern with the bill was that it did not sufficiently preserve fair dealing in the digital environment, as any circumvention of a digital lock (with certain limited exceptions) would violate the law. Bill C-61 died on the *Order Paper* after the dissolution of Parliament on 7 September 2008 for the October 2008 election.

In the Speech from the Throne opening the 1st Session of the 40th Parliament in November 2008, the government reiterated its commitment to copyright reform, stating, “Cultural creativity and innovation are vital not only to a lively Canadian cultural life, but also to Canada’s economic future. Our Government will proceed with legislation to modernize Canada’s copyright laws and ensure stronger protection for intellectual property.”⁴⁵

From 20 July 2009 until 13 September 2009, the Government of Canada held public consultations on copyright led by the Ministers of Industry and Canadian Heritage.⁴⁶ The consultations consisted of round tables, town hall meetings, online submissions and online discussions.

While no legislation was introduced by the government in the autumn or winter following the copyright consultations, the government reiterated its commitment to copyright reform in the Speech from the Throne opening the 3rd Session of the 40th Parliament on 3 March 2010.⁴⁷

Bill C-32, An Act to Amend the Copyright Act, was introduced in the House of Commons on 2 June 2010.⁴⁸ Second reading debate on Bill C-32 took place on 2, 3 and 5 November 2010, at which point the bill was deemed read a second time and was referred to a committee. The Legislative Committee on Bill C-32 held a total of 20 meetings between November 2010 and March 2011, and heard from over 100 witnesses from various stakeholder organizations.

The legislative committee heard, among others, former Minister of Industry Tony Clement and Canadian Heritage Minister James Moore; departmental officials from Industry Canada and Canadian Heritage; law professors; and lawyers who specialize in intellectual property. The committee also heard testimony from representatives of collective societies, ISPs, broadcasters, the software industry, the business sector, the recording industry, and the film and television industry. Finally, associations of publishers, writers, artists, actors, libraries and museums, disabled persons, and from the education sector also appeared before the committee.

Some of the main issues that were debated before the committee and discussed in the submitted briefs and that will likely be debated again as Bill C-11 is referred to a legislative committee in the House of Commons, include:

- technological protection measures (TPMs);
- the addition of “education” to the list of fair dealing exceptions;
- the absence of amendment to the private copying levy; and
- the liability of Internet service providers (ISPs) and search engines.

As well, various witnesses proposed amendments to limit the scope (and possible unintended consequences) of the “user-generated content” or “mash-up” exception, as well as to tighten the language around proposed clause 18 (“enabling infringement”) to ensure that rights holders can indeed pursue those who enable copyright infringement. Finally, a number of witnesses expressed concern that proposed clause 34 of the bill, which would remove the requirement for broadcasters to pay for the making of ephemeral copies of recordings if they are held by the broadcaster for 30 days or less, would result in revenue losses for musical artists.

Bill C-32 died on the *Order Paper* upon the dissolution of Parliament on 26 March 2011 for the May 2011 election of the 41st Parliament. In the Speech from the Throne opening the 1st Session of the 41st Parliament in June 2011, the government indicated its intention to move forward with copyright reform, stating: “Our Government will introduce and seek swift passage of copyright legislation that balances the needs of creators and users.”⁴⁹ As noted above, Bill C-11 was introduced in the House of Commons on 29 September 2010. The provisions of Bill C-11 are the same as those that had been in Bill C-32.

2 DESCRIPTION AND ANALYSIS

The following section provides a summary overview of selected provisions contained in Bill C-11, organized in accordance with the structure of the *Copyright Act*.

2.1 INTERPRETATION (CLAUSE 3)

Clause 3 of the bill adds a new subsection to section 2.4 of the Act, clarifying that the making available of a work or other subject matter to the public at a place and time chosen by the public by means of telecommunication is included within the meaning of “communication of a work or other subject-matter to the public by telecommunication” (see more particularly clauses 9 and 11).

2.2 PART I OF THE ACT: COPYRIGHT AND MORAL RIGHTS IN WORKS (CLAUSES 6 AND 7)

2.2.1 PHOTOGRAPHS

Clause 6 of the bill repeals section 10 of the Act (term of copyright for photographs).

Clause 7 of the bill repeals subsection 13(2) of the Act (ownership of copyright for commissioned photographs). The bill seeks to make the photographer or painter the owner of copyright in photographs or portraits that have been commissioned, thereby bringing the ownership of copyright in photographs in line with other works. Presently, the person who commissions a photograph or portrait, rather than the photographer, is deemed to be the first owner of the copyright. Photographers, therefore, have had to rely on contractual arrangements to obtain rights to reproduce their photographs. The bill gives the person who commissioned the photograph or portrait limited rights to use it for personal or non-commercial use without the photographer or artist’s permission, subject to any contract that specifies otherwise.⁵⁰

2.3 PART II OF THE ACT: COPYRIGHT IN PERFORMERS’ PERFORMANCES, SOUND RECORDINGS AND COMMUNICATION SIGNALS AND MORAL RIGHTS IN PERFORMERS’ PERFORMANCES (CLAUSES 8–17)

Clauses 8 to 17 of the bill modify Part II of the Act.

Clause 8 of the bill confers a new title on Part II of the Act (provided above) adding moral rights in performers’ performances to the title.

Clauses 9 and 11 of the bill provide a new exclusive right to performers and makers of sound recordings at sections 15 and 18 of the Act to make a sound recording available to the public over the Internet and to sell or transfer the ownership in a physical recording for the first time. The making available right is found in the two 1996 WIPO Internet Treaties, the WCT⁵¹ and the WPPT⁵² that Canada intends to implement with reform of the *Copyright Act*. The making available right is an exclusive right for rights-holders to authorize or prohibit the dissemination of their works and other protected material through interactive networks such as the Internet (for example, via iTunes). Note that this right already essentially exists for authors.)⁵³

Clause 10 of the bill provides that a performer will enjoy moral rights in his or her performance for the same term as the copyright in that performance, as required by Article 5 of the WPPT⁵⁴ (proposed sections 17.1 and 17.2 of the Act).

Under clauses 13 and 14 of the bill, a sound recording “made available to the public” is deemed to be “published” for the purposes of section 19 of the Act (proposed sections 19.1 and 19.2 of the Act).

Clauses 15 and 16 relate to the extension of protection to foreigners⁵⁵ with respect to performances and sound recordings. Such remuneration rights are the subject matter of a number of detailed provisions, apparently designed to satisfy the minimum requirements of the various international agreements that Canada has ratified or signed (Rome Convention, WPPT) (proposed amendments to sections 20 and 22 of the Act).

Clause 17 of the Bill sets the term of copyright protection in performers’ performances as 50 years from the end of the calendar year in which the performance occurs. If the performance is fixed before the end of the term of protection, it would be protected for 50 years after its fixation. If the sound recording of it is published before the end of the term of protection, the performance would then be protected for the earlier of 50 years after the publication of the sound recording or 99 years after the performance occurred. Sound recordings are to be protected for 50 years after their first fixation or, if published, for 50 years after publication. Copyright in a communication signal would subsist for 50 years following the broadcast of the signal (proposed amendments to section 23 of the Act).

2.4 PART III OF THE ACT: INFRINGEMENT OF COPYRIGHT AND MORAL RIGHTS AND EXCEPTIONS TO INFRINGEMENT (CLAUSES 18–41)

Clauses 18 to 41 of the bill modify Part III of the Act.

Clause 18 of the bill adds the following to section 27 of the Act: a clarification regarding a copy made under an exception outside Canada; a provision on secondary infringement related to a lesson; and provisions indicating that it is an infringement to provide through the Internet, or another digital network, a service that is designed primarily to enable acts of copyright infringement if actual infringement occurs as a result of the use of that service.

Clauses 19 and 20 extend moral rights to performer’s performances. Moral rights include the right to the integrity of the work and the right to be associated with a work by name or a pseudonym, or to be anonymous (proposed sections 28.1 and 28.2 of the Act).

2.4.1 FAIR DEALING (CLAUSES 21 AND 22)

Clause 21 of the bill expands the scope of the fair dealing exception at section 29 of the Act to include new purposes: education, parody or satire (in addition to research and private study in that same section, and criticism and review at section 29.1). As suggested by the government and some commentators, education apparently refers to a structured context⁵⁶ and would include training in the private sector but would not cover “education” of the public at large.⁵⁷

Clause 22 of the bill adds four sections to the Act following the existing sections on fair dealing:

- New section 29.21 of the Act creates a new exception for content generated by non-commercial users (this has been referred to as the “UGC” (user-generated content) or “mash-up exception”). Under this exception, a consumer has the right to use, in a non-commercial context, a publicly available work in order to create a new work. This exception is subject to conditions, namely the identification of the source, the legality of the work or the copy used, and the absence of a substantial adverse effect on the exploitation of the original work.
- New section 29.22 of the Act provides that a consumer has the right to reproduce for a private purpose any work or protected subject-matter if the source copy was legally obtained (this has been referred to as the “format-shifting” provision). Under subsection (3), this provision is only applicable where Part VIII does not apply. In other words, this exception would not apply to the copy of a musical work made onto an audio recording medium as defined in section 79 of the Act. Bill C-11 does not propose to amend section 79, for example to refer to media and devices. Therefore, under the bill, reproductions for private use on anything other than CD-Rs and Mini-Disc will not give rise to any remuneration to authors, publishers, performers or sound recordings makers.⁵⁸ The extent of the format shifting right, though, is more circumscribed than the private copying right found at section 80 of the Act. As well, the format shifting exception does not apply to works protected by technological protection measures.
- New section 29.23 of the Act allows for “time-shifting.” Individuals are able to make a fixation of a communication signal or reproduce a work, sound recording or performance being broadcast for the purpose of privately viewing the work at a later time, provided that the signal is received legally, only one recording is made, it is used for private purposes, and is not given away. This exception does not apply to works or sound recordings accessed through an on-demand service, or to works protected by technological protection measures.
- New section 29.24 of the Act provides an exception for backup copies. Like the sections before it, it does not apply to works protected by technological protection measures.

2.4.2 EDUCATIONAL INSTITUTIONS (CLAUSES 23–27)

Clauses 23 through 27 of the bill apply to the exceptions available to educational institutions:

- Clause 23 allows educational institutions, for educational purposes, to reproduce a work or to do any other necessary act in order to display it. It broadens the current exception, which only allows for manual reproduction or a copy for an overhead projector, by making it technology/means neutral. This exception would not apply to works that are commercially available in the Canadian market or for which a licence is available from a collective society (proposed amendments to section 29.4 of the Act).
- Clause 24 modifies the provisions regarding performances arranged or done by educational institutions for educational or training purposes to clarify that such performances should not be based on infringing copies of works (proposed amendments to section 29.5 of the Act).

- Clause 25 removes the requirement for educational institutions using news and commentary to pay royalties or to destroy copies of news or comment programs after one year (proposed amendments to section 29.6 of the Act).
- Clause 26 removes the record-keeping requirement for copies of news or comment programs (proposed repeal of paragraph 29.9(1)(a) of the Act).
- Clause 27 of the bill adds various new sections to the Act (30.01 to 30.04):
New section 30.01 defines “lesson.” According to this section, it is not an infringement of copyright for educational institutions to communicate to the public or to make a fixation of a “lesson” during which a potential copyright infringement is made by an educational institution (an act that would otherwise be an infringement but is permitted under a limitation or exception under the Act). This can facilitate distance learning by permitting the institution to communicate the lesson to the public (i.e., the students enrolled in the course) over the Internet for educational or training purposes. However, various obligations would be imposed on educational institutions, such as an obligation to destroy the fixation within 30 days after receipt by students of their final course evaluations, and to take measures reasonably expected to prevent the students from fixing, reproducing or communicating the lesson other than as allowed in this section (see proposed subsection 30.01(6)).
- New sections 30.02 and 30.03 of the Act create an exception to allow educational institutions that have a licence for the reprographic reproduction of works to make digital reproductions and to communicate them. An obligation to take measures to prevent communication to the public is once again imposed on educational institutions. This exception would not apply where a collective licence is in place or where a tariff has been certified. The right of a copyright owner to recover damages from educational institutions for a digital reproduction or for the communication of such a reproduction would be limited to the amount of royalties established by the licence in place.
- New section 30.04 of the Act allows educational institutions, for educational purposes, to reproduce, communicate and perform for students works that are available on the Internet, provided that such materials are legitimately posted, are not clearly marked as prohibiting such reproduction and if the educational institution was not aware that the materials were posted on the Internet in violation of the owner’s rights. A copyright symbol alone would be insufficient as notice that the exception does not apply to a work.

2.4.3 LIBRARIES, ARCHIVES AND MUSEUMS (CLAUSES 28–30)

Clauses 28 to 30 of the bill apply to libraries, archives, and museums: Clause 28 slightly expands the exception found in paragraph 30.1(1)(c) of the Act by allowing a library, an archive or a museum to address obsolescence before it actually occurs (for example, by making a copy of a work in its permanent collection in an alternative format if the original is in a format that is becoming obsolete or the technology required to use the original is unavailable or is becoming unavailable). Clause 29 of the bill permits libraries to distribute materials digitally; however, the library must take measures to ensure that the client prints one copy only of the digital form, does not communicate the copy to another person and ensures that the copy is destroyed within five days of using it. Digital distribution is only permitted if there are no digital locks on the materials. Clause 30 applies similar provisions to unpublished works deposited in archives.

2.4.4 FURTHER EXCEPTIONS (CLAUSES 31–41)

Clauses 31 and 32 of the bill add exceptions to attempt to avoid liability for reproductions that are simply made for technical reasons, such as with respect to computer programs (at sections 30.6 and following of the Act). Clause 31 allows the reproduction of computer programs for the purpose of interoperability, encryption, research, and correcting security problems. Clause 32 allows temporary reproductions of works to be made for the sole purpose of facilitating a use that is not an infringement of copyright.

Clause 33 of the bill slightly amends subsection 30.8(11) of the Act after paragraph (c) to allow the Canadian Radio-television and Telecommunications Commission (CRTC) to exempt an undertaking from the requirement to hold a broadcasting licence issued by the CRTC. This technical amendment is intended to avoid the incongruous situation of exempting only licensed broadcasters and not those exempted by the CRTC from the licensing requirement.

Clause 34 of the bill amends the provision of the Act dealing with ephemeral recordings made for broadcasting purposes (section 30.9 of the Act). More specifically, the proposed amendment eliminates subsection 30.9(6) of the current Act, which provides that the ephemeral recording exception does not apply if a licence is available from a collective society. The elimination of this provision appears to indicate an intention to eliminate the current obligation of broadcasters to pay for copies made for the purpose of broadcasting.⁵⁹ Again, this applies only to ephemeral recordings, which must be destroyed in any event within 30 days after making the reproduction (unless the copyright owner allows the reproduction to be retained).

Clause 35 (at new section 31.1 of the Act) exempts “persons providing services related to the operation of the Internet or other digital networks” from liability for copyright infringement when they are acting solely as intermediaries in communication, hosting and caching activities. As well, it adds an exemption for web-hosting service providers to store the works without infringing copyright, unless the web host knows of a court decision holding that the stored material infringes copyright.

Clauses 36 and 37 of the bill add exceptions for persons with perceptual disabilities (sections 32 and 32.01 of the Act). Clause 37 introduces an exception for non-profit organizations acting for the benefit of persons with a print disability⁶⁰ to make a copy of a work in a format specifically designed for persons with a print disability, and to send a copy of the work to similar organizations abroad (with some conditions).

Clause 38 adds a provision to section 32.2 of the Act to provide a person who commissioned a photograph or portrait limited rights to use it for personal or non-commercial use without the photographer or artist's permission, subject to any contract that specifies otherwise.

Clauses 39, 40 and 41 contain transitional amendments to sections of the Act to provide protection for investments made with respect to the doing of acts after the provisions come into force.

2.5 PART IV OF THE ACT: REMEDIES (CLAUSES 42–45)

Clauses 42 to 49 of the bill modify Part IV of the Act.

Clauses 42, 43 and 44 contain amendments to sections 34 and 34.1 of the Act. Clause 42 adds “*Infringement of Copyright and Moral Rights*” before section 34 of the Act; clause 43 contains a minor modification to subsection 34(2) of the Act regarding proceedings for infringement of a moral right of an author. Clause 44 clarifies that the presumption of subsistence and ownership of copyright provided under section 34.1 applies to civil proceedings only.

Clause 45 repeals sections 36 (protection of separate rights and apportionment of damages or profits) and 37 (concurrent jurisdiction of the Federal Court) of the Act. However, clause 47 (see below) simply moves these provisions to new sections 41.23 and 41.24 of the Act.

2.5.1 DAMAGES (CLAUSE 46)

Clause 46 of the bill modifies the rules applicable to the award of statutory damages⁶¹ under section 38.1 of the Act. Currently, statutory damages range from \$500 up to a maximum of \$20,000 per work infringed (current subsection 38.1(1) of the Act). Under Bill C-11, the amount of statutory damages available to the copyright holder becomes dependent upon the commercial or non-commercial purpose of the infringement (proposed paragraphs 38.1(1)(a) and (b)). The current range of statutory damages would apply to cases of infringement for commercial purposes only. The bill limits the availability of statutory damages in cases of infringement for non-commercial purposes, and caps their amount at between \$100 and \$5,000 for all infringements in a single proceeding for all works. This reduced damage award would apply, for example, to individuals who download music from peer-to-peer file-sharing services.⁶² A court may lower the award of statutory damages for commercial infringement if the total award would be, in the court’s opinion, grossly out of proportion to the infringement (proposed subsection 38.1(3) of the Act). As well, the clause adds a proportionality requirement for damages for non-commercial infringement (proposed paragraph 38.1(5)(d) of the Act).⁶³

2.5.2 TECHNOLOGICAL PROTECTION MEASURES (CLAUSES 47–49)

Clause 47 contains new provisions for technological protection measures and rights management information as well as liability of providers of network services (or Internet service providers) or information location tools, at proposed sections 41 to 41.27 of the Act.

- The definition of “technological protection measure” (TPM) at proposed section 41 of the Act is broken down into two categories: a) any effective technology, device or component that controls access to a work, and b) any effective technology, device or component that restricts one from exercising the exclusive rights of a copyright owner (found in sections 3, 15 and 18 of the Act) or remuneration rights (proposed section 19 of the Act), or in other words, technologies that control copying of a work.

- Under proposed section 41.1 of the Act, it is prohibited to circumvent the first category of TPM, being locks that control access to a work, even if the work subject to the TPM is legally acquired. The question is what difference the distinction between access controls (access to the work itself) and copy controls (copying the work) makes for TPMs. One argument posits that the fact that Bill C-11, like its predecessor, Bill C-32, contains no blanket prohibition against circumventing copy-control protections measures means that the TPM provisions do not risk overriding the fair dealing provisions of the *Copyright Act*.⁶⁴ The alternative argument asserts that the distinction between access and copy control TPMs is a “distinction without a difference for many of today’s TPMs.”⁶⁵ The observation is made that “[t]he digital locks used on e-books or the TPMs on DVDs are both access and copy controls. In order to effectively circumvent to be able to copy, you have to circumvent access. The locks often permit access for some uses, but not others. In other words, Canadians will often need to circumvent access to get to the copying and therefore will still be infringing under the law.”⁶⁶ The concern is that, for example, if a TPM is used on books, movies or music, a user may not be able to override the TPM to copy the content. If so, this prohibition could trump a number of other rights in the proposed new *Copyright Act*, such as the new format-shifting rights.⁶⁷ Bill C-61, the 2008 attempt at copyright reform, included the same distinctions (though with the term “technological measure” instead of “technological protection measure”),⁶⁸ whereas Bill C-60, the 2005 attempt at copyright reform, limited the definition of “technological measure” to copy controls.⁶⁹
- Proposed section 41.1 also prohibits the distribution and marketing of devices, such as software, that can be used to circumvent TPMs (no distinction is made here between access and copy control TPMs). In case of contravention of the TPM provisions, a copyright owner would be entitled to all remedies for infringement of copyright.
- The intent of the TPM provisions is to enable ratification of the two 1996 WIPO Internet Treaties: the WPPT and the WCT. Article 11 of the WCT states, “Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.”⁷⁰ Article 18 of the WPPT contains a similar provision. Note that while the WCT and the WPPT require Contracting Parties to adopt TPMs, the phrase “in connection with the exercise of their rights” suggests that a variety of approaches may satisfy the requirement for “effective legal remedies.”
- Proposed sections 41.11 through 41.18 of the Act contain several exceptions to the prohibition on circumventing TPMs. Circumstances where the circumvention of TPMs is allowed include: law enforcement and national security activities (section 41.11); reverse engineering for software compatibility (section 41.12); encryption research (section 41.13); verification as to whether a TPM permits the collection or communication of personal information (section 41.14); security testing of computer systems (section 41.15); access for persons with perceptual disabilities (section 41.16); temporary recordings made by broadcasters for technical reasons (section 41.17); and unlocking cellphones (“gaining access to a telecommunications service by means of a radio apparatus,” section 41.18).⁷¹

- Proposed section 41.19 of the Act allows a court to reduce the amount of damages awarded for TPM circumvention if the defendant was not aware and had no reasonable grounds to believe that the defendant's acts contravened the TPM provisions.
- Proposed section 41.2 of the Act provides that an injunction is the only remedy that can be taken against a library, archive, museum or educational institution if the defendant was not aware and had no reasonable grounds to believe that the defendant's acts contravened the TPM provisions.
- Proposed section 41.21 of the Act provides that the Governor in Council may make regulations to add exclusions to the TPM provisions given certain considerations.
- Proposed section 41.22 of the Act prohibits the removal or alteration of rights management information, if the person doing such acts knows that the removal or alteration will facilitate or conceal any infringement of copyright, or adversely affect a copyright owner's right to remuneration. In case of contravention, a copyright owner is entitled to all remedies for infringement of copyright.
- As noted above, proposed sections 41.23 (protection of separate rights and apportionment of damages or profits) and 41.24 (concurrent jurisdiction of the Federal Court) are the same as the old sections 36 and 37, though they are moved to later sections in the Act given the proposed new sections on TPMs.
- Proposed sections 41.25 and 41.26 set out the role of network service providers (or Internet service providers [ISPs]) and information location tools (search engines) in preventing copyright infringement. These proposed sections create a "notice-and-notice" system (already in use⁷²) for informing suspected copyright infringers of a copyright owner's desire to enforce the owner's rights. First a copyright holder would send notification to the ISP or search engine in a prescribed format identifying an electronic location to which a claimed infringement relates. The ISP would then forward this notification to the subscriber (the person to whom the electronic location belongs). The ISP or search engine would be required to store the subscriber's IP information for six months, or a year if a court action stems from the infringement. Failure to maintain such information could make the ISP liable to statutory damages ranging from \$5,000 to \$10,000.
- Proposed section 41.27 of the Act limits to an injunction copyright owners' remedies against information location tool providers (search engines) found to have infringed copyright, provided certain conditions are met.

Clause 48 makes it a criminal offence to circumvent a TPM for commercial purposes, with penalties of a fine not exceeding \$1,000,000 or imprisonment for a term not exceeding five years, or both, if convicted on indictment, and a fine not exceeding \$25,000 or imprisonment for a term not exceeding six months, or both, upon summary conviction (proposed subsection 42(3.1) of the Act).

Clause 49 sets out the limitation or prescription period for civil remedies under the Act (proposed section 43.1 of the Act).

2.6 PART V OF THE ACT: ADMINISTRATION (CLAUSE 50)

Clause 50 contains a consequential amendment to section 58 of the Act regarding execution of instruments (of an assignment or licence of copyright) for the purposes of implementing the WIPO Internet Treaties.

2.7 PART VI OF THE ACT: MISCELLANEOUS PROVISIONS (CLAUSE 51)

Clause 51 modifies section 62 of the Act regarding regulations that can be made by the Governor in Council. The clause grants the Governor in Council the power to create regulations specifying the measures that an educational institution must take when delivering lessons to students through the Internet and when making digital copies of a work. The clause also grants the Governor in Council the power to prescribe the procedure for the “notice-and-notice” regime applicable to Internet service providers, web hosting businesses and search engine operators.

2.8 PART VII OF THE ACT: COPYRIGHT BOARD AND COLLECTIVE ADMINISTRATION OF COPYRIGHT (CLAUSES 52–57)

Clause 52 modifies subsection 67.1(4) of the Act. Section 67.1 mandates when a collective society must file proposed tariffs to the Copyright Board. According to subsection (4), if the collective society does not file a tariff, then it cannot commence an action without the written consent of the Minister. To the list of actions for infringement that cannot be commenced if no tariff had been filed, clause 52 adds references to the new making available right for performers’ performances and sound recordings found at proposed paragraphs 15(1.1)(d) or 18(1.1)(a) of the Act.

Clause 53 contains a consequential amendment to subparagraph 68(2)(a)(i) of the Act regarding consideration by the Copyright Board or criteria and factors to consider for proposed tariffs and objections. It adds a reference to modified section 20 regarding the right of remuneration of performers.

Clause 54 contains a consequential amendment to subsection 68.2(2) of the Act regarding when proceedings for the collection of royalties are to be barred if royalties are tendered or paid by adding a reference to the making available right for performers and sound recorders found at proposed paragraphs 15(1.1)(d) and 18(1.1)(a).

Clause 55 contains a consequential amendment to subsection 71(1) of the Act regarding the filing of proposed tariffs in particular cases, removing the reference to paragraph 29.6(2), which is repealed by clause 25.

Clause 56 amends subsection 76(2) of the Act regarding when royalties may be recovered by a non-member of a collective society. It also removes the ability of the Copyright Board to set periods during which royalties must be collected for those educational uses that would no longer be subject to a right of remuneration (by proposing repeal of subparagraphs 76(4)(b)(i) and (ii) of the Act).

Clause 57 amends subsection 78(1) of the Act regarding determination extending the jurisdiction of the Copyright Board to award compensation for acts done before recognition of copyright or moral rights, in keeping with amendments in clause 41 (new subsections 33.1(2) and 33.2(2)). These new subsections deal with compensation of investors by right holders for acts that otherwise would not have been infringed if the various provisions had not come into force. It provides for right holders to compensate investors in order to claim or reclaim their new rights.

2.9 PART VIII OF THE ACT: PRIVATE COPYING

The Bill contains no proposed modifications to Part VIII of the Act.

2.10 PART IX OF THE ACT: GENERAL PROVISIONS (CLAUSE 58)

Clause 58 amends section 92 of the Act to require a review of the *Copyright Act* by Parliament every five years (by a committee of the Senate, the House of Commons, or both), rather than a departmental review, which would be referred to a parliamentary committee upon completion.

2.11 TRANSITIONAL PROVISIONS (CLAUSES 59–62)

Clauses 59 to 62 contain transitional provisions. Clauses 59 to 61 ensure that copyright that has expired in photographs is not revived by provisions in the bill. The clauses also grandfather corporations and individuals that were deemed to be authors of photographs under existing provisions so that these persons would continue to hold copyright in those photographs following the coming into force of the new provisions. Rights in other commissioned works are also grandfathered, as copyright in these works would continue to be held by the one who commissioned the works unless agreed otherwise through a contract. Clause 62 clarifies what limitation or prescription periods would apply once the bill came into force.

2.12 COMING INTO FORCE (CLAUSE 63)

Clause 63 specifies that the provisions of the bill will come into force on a day or days to be fixed by order of the Governor in Council.

3 COMMENTARY

3.1 INITIAL PUBLIC REACTION TO BILL C-11

When Bill C-32 was tabled in June 2010, initial reaction was mixed, with media focussing on the TPM provisions of the bill, and whether they trump the fair dealing exceptions found in the Act and the bill. The other aspects of the bill that were subject to public comment included the expanded fair dealing exceptions, the absence of any changes to the private copying regime and levy, the “notice-and-notice” regime for ISPs, and the distinction in statutory damages for commercial or non-commercial infringement.⁷³

At the outset, commentators found the bill to be “flawed but fixable,”⁷⁴ “a reasonable compromise,”⁷⁵ “a compromise that leaves no one totally happy,”⁷⁶ and a controversial piece of legislation for which all interested parties should be given a “fair hearing before rushing to pass this into law.”⁷⁷

Following the tabling of Bill C-11 on 29 September 2011, media and stakeholder reaction generally took a more muted, though similar, tone to the initial reaction to Bill C-32. As the governing party now holds a majority of seats in Parliament, much commentary on Bill C-11 has focused on how quickly the bill will be passed, and whether or not the governing party will entertain amendments to the bill’s provisions.⁷⁸ On a related note, at least one news article highlighted that a number of copyright cases will be heard by the Supreme Court of Canada during the first week of December 2011, while Bill C-11 makes its way through Parliament.⁷⁹

3.2 ISSUES ANALYSIS

3.2.1 FAIR DEALING AND TECHNOLOGICAL PROTECTION MEASURES

When Bill C-32 was first introduced, consumer groups, students, libraries, schools and museums expressed general approval of the fair dealing and related provisions found in the bill⁸⁰ (and now in Bill C-11), though some advocated a more flexible approach to fair dealing. However, these groups also expressed varying degrees of concern about the extent to which the TPM or digital lock provisions of the bill could “trump” users’ use of legitimately acquired copyright material (see section 2.5.2, “Technological Protection Measures,” above, for a discussion of TPMs’ reach). On the other hand, at that time various creator groups and collectives⁸¹ expressed disapproval of or concern with the expanded fair dealing and related provisions found in the bill, owing to perceived loss of revenue. This is particularly with regard to the proposed addition of “education” to the Act’s section on fair dealing.

Some groups, such as record labels,⁸² are supportive of strong TPM provisions in concert with the expanded fair dealing and related provisions, whereas other groups, such as certain musical artist and performer organizations and collectives would prefer that the private copying levy be extended to digital recording media such as iPods and MP3 players as a way to offset the expanded fair dealing provisions.⁸³

Since the introduction of Bill C-11, both University of Ottawa law professor Michael Geist and intellectual property lawyer Barry Sookman have examined these issues in the context of testimony received at the Legislative Committee on Bill C-32.⁸⁴

3.2.1.1 TPMs: CONSTITUTIONAL CONCERNS

Subsection 91(23) of the *Constitution Act, 1867*⁸⁵ confers upon Parliament the exclusive jurisdiction to legislate in relation to copyrights, whereas subsection 92(13) of the *Constitution Act, 1867* grants the power to legislate with respect to “property and civil rights in the province” exclusively to the provincial legislatures. Some have questioned whether Parliament has the constitutional authority to enact laws regarding digital rights management and technological protection measures to

protect works. This is because it is thought that anti-circumvention legislation and controlling access to a work are means of protecting property and also implicate contractual obligations, consumer protection and e-commerce – all areas which fall under provincial jurisdiction – rather than matters relating to copyright, which falls under federal jurisdiction.⁸⁶

The wide use of TPMs or rights management information could also have an impact on Canadians' freedom of expression rights.⁸⁷ This could lead to *Canadian Charter of Rights and Freedoms* challenges of the provisions if they result in restrictions on freedom of expression.⁸⁸

3.2.1.2 TPMs: PRIVACY CONCERNS

In January 2008, before the June 2008 introduction of Bill C-61, the government's previous attempt at copyright reform, federal Privacy Commissioner Jennifer Stoddart wrote a letter to the Ministers of Industry and Canadian Heritage expressing concern about how the use of digital rights management or technological protection measures to prevent copyright infringement could have a negative impact on the privacy rights of Canadians.⁸⁹ The Privacy Commissioner's concerns arose from her mandate under the *Personal Information Protection and Electronic Documents Act*⁹⁰ (PIPEDA), which stipulates that entities engaged in commercial activities may collect, use or disclose personal information "only for purposes that a reasonable person would consider are appropriate in the circumstances"; it also states that only the personal information necessary for that purpose may be collected, used or disclosed. According to PIPEDA, except in specified situations, personal information may not be collected, used or disclosed without the knowledge and consent of the individual to whom the personal information relates. In her letter, the Privacy Commissioner expressed concern about the ability of TPMs to collect, use and disclose personal information without consent.⁹¹

In her 2008 letter, the Privacy Commissioner also noted that the means exist to circumvent TPMs and thus prevent the collection of personal information, though she observed that previous proposals to amend the *Copyright Act* contained anti-circumvention provisions. As described above, however, Bill C-11 contains an exception to the anti-circumvention provisions for verification as to whether a TPM permits the collection or communication of personal information (at proposed section 41.14). The Privacy Commissioner has not indicated, as of yet, whether this exception can be considered sufficient.

3.2.1.3 TPMs: DEBATE REGARDING PROPOSED ALTERNATIVE LANGUAGE

Bill C-60, the 2005 attempt at copyright reform, took a different approach to TPMs. Proposed subsection 34.02(1) of Bill C-60 provided the following:

An owner of copyright in a work ... [is], subject to this Act, entitled to all remedies ... for the infringement of a right against a person who, without the consent of the copyright owner or moral rights holder, circumvents, removes or in any way renders ineffective a technological measure protecting any material form of the work, the performer's performance or the sound

recording for the purpose of an act that is an infringement of the copyright in it or the moral rights in respect of it or for the purpose of making a copy referred to in subsection 80(1) [author's emphasis].⁹²

Bill C-60, unlike bills C-61, C-32 and now C-11, contained language specifying that infringement of a digital lock would only constitute a violation of the Act if the breaking of the lock was in order to infringe copyright. Bill C-11, by not including any limiting language regarding the purpose of infringement, casts a wider net than Bill C-60.

Dalhousie law professor Graham Reynolds has criticized Bill C-32's approach, which is replicated in Bill C-11, as undermining "the balance between copyright owners and other parties that Bill C-32 purports to achieve. If the bill is passed in its current form, users, consumers, follow-on creators, and future innovators can effectively be prevented from exercising their rights – both those that existed before Bill C-32 and those introduced by it – through the application of a digital lock. Criticism, research, education, creativity, and innovation may suffer as a result. Such an amendment risks impoverishing the values underlying the constitutionally protected right to freedom of expression, and may not withstand the scrutiny of the Charter of Rights and Freedoms."⁹³ He argues that balance can be achieved by reverting to the language in Bill C-60, making it an offence to circumvent a TPM for an infringing purpose. According to Reynolds, the language in Bill C-60 containing the proviso "for an infringing purpose" is consistent with the two 1996 WIPO Internet Treaties, and would enable copyright owners to fight against copyright infringement in the digital age while ensuring that all other parties are not prevented from exercising their rights.

University of Ottawa law professor Michael Geist has written extensively on the TPM provisions of Bill C-11 and Bill C-32, arguing that TPM circumvention should be permitted for lawful purposes.⁹⁴ Together with Keith Rose, he has drafted alternative language for the TPM provisions of the bill that he posits "is compliant with the WIPO Internet Treaties, provides legal protection for digital locks, and maintains the copyright balance."⁹⁵ He proffers two approaches. The first approach would involve amending the definition for "circumvent" to account for only infringing purposes.⁹⁶ Alternatively, the second approach would be to add an explicit exception for circumvention for lawful purposes.⁹⁷

However, Dr. Mihály Ficsor, former Assistant Director General of WIPO and author of the *WIPO Guide to Collective Administration of Copyright and Related Rights*, argues that in order for the anti-circumvention provisions in the WIPO Internet Treaties to be enforceable, the broader language found in Bill C-32, which is also found in Bill C-11, is necessary. He takes specific issue with Professor Geist's proposals, writing,

... I noticed that the blogger [referring to Michael Geist] has now made specific recommendations for amendments to the TPM provisions in the bill. These include, among other things, limiting the protection of TPMs to circumvention for an infringing purpose. He proposes instead an exception that circumvention be permitted 'for any lawful purpose.' It should be clear from my commentary that these proposals would not provide adequate legal protection for TPMs and would not result in a bill that would comply with the Internet Treaties.⁹⁸

According to Dr. Ficsor,

... the effective TPMs that the Contracting Parties of the Treaties must protect include all those ‘that restrict acts in respect of’ protected works, performances and phonograms, including acts of gaining access to them. From the viewpoint of this obligation, it should not be necessary to prove that the prohibited acts of circumvention constitute, or specifically further, infringements (i.e., unauthorized copying, communication to the public, or some other exercise of an exclusive right of the copyright owner). If the Diplomatic Conference had intended to necessarily link the prohibition of the acts involved to infringements, it would have provided it, as it did so in the case of the prohibited acts concerning rights management information. [See Article 12 of the WCT and Article 19 of the WPPT.] It did not, because the delegations recognized that requiring proof of a direct link to copyright infringement would cut the heart out of the anti-circumvention obligation.

In sum, according to Dr. Ficsor, “to apply legal prohibitions against circumvention only when they also involve actual or attempted copyright infringement would be to misapprehend the very purpose of the relevant provisions of WCT and WPPT.”

3.2.2 PRIVATE COPYING LEVY: EXTENDING THE LEVY TO DIGITAL RECORDING DEVICES SUCH AS IPODS AND MP3 PLAYERS

Generally speaking, recording artists and the collectives that represent them⁹⁹ favour extending the private copying regime found in Part VIII of the *Copyright Act* to digital recording devices such as iPods and MP3 players. This is often couched as a sort of “offset” to the proposed fair dealing and related provisions found in Bill C-11. Retailers, on the other hand, are opposed to the extension of the private copying levy, while record labels see the levy as being of limited value while risking legitimizing the laundering of illegally acquired music.¹⁰⁰

The private copying regime set out in Part VIII (sections 79 to 88) of the *Copyright Act* is aimed at compensating rights holders for the economic losses they incur from the copying of sound recordings by individuals onto “blank audio recording media.” Private copying is not an example of “fair dealing,” which is a different legal concept. In the course of the past decade there has been disagreement as to whether digital recording devices with non-removable memory such as MP3 players can fall within the definition of an “audio recording medium” and be subject to the private copying royalty regime. Various Federal Court of Appeal decisions have overturned the Copyright Board’s determinations that MP3 players can be “audio recording media,” ruling that the Board does not have jurisdiction to impose a levy on memory permanently embedded in digital audio recorders and that the levies that had been set on such devices are invalid.¹⁰¹

In March 2010, New Democratic Party Member of Parliament Charlie Angus introduced a private member’s bill aimed at extending the private copying levy to digital audio recording devices.¹⁰² Both former Industry Minister Tony Clement and Canadian Heritage Minister James Moore rejected the bill as a “tax on iPods” and other portable devices that would hurt consumers.¹⁰³ The private member’s bill has not been re-tabled to date in the 41st Parliament.

In a 2005 paper prepared for Industry Canada titled *Economic Impact of Options for Reforming the Private Copying Regime*, author Ronald Hirshhorn noted, “The private copying system will impact on stakeholders quite differently in coming years depending on whether or not the government introduces an amendment to bring digital audio recording devices (DARs) under the Act.”¹⁰⁴ Hirshhorn raises a number of interesting points, including the possible relationship between the extension of the levy and illegal downloading, the fact that a music purchaser might effectively compensate a rights holder twice,¹⁰⁵ and whether significantly higher levies would be the result should the eligible repertoire of rights holders be expanded to include makers and performers in other WPPT countries, leaving Canadian rights holders with a smaller portion of royalty payments.¹⁰⁶

3.2.3 “NOTICE-AND-NOTICE” VS. “NOTICE-AND-TAKEDOWN” VS. “GRADUATED RESPONSE” REGIMES FOR INTERNET SERVICE PROVIDERS

As described above, the proposed “notice-and-notice” regime requires ISPs to forward any notice of infringement they receive from copyright owners to the subscriber in question. On the other hand, a “notice-and-takedown” regime typically requires an ISP to block access to material upon receipt of a notice from a rights holder that alleges such material to be infringing. The obligation to block access lies with the ISP whose facilities are being used to host the allegedly infringing material. Under Canadian law, the courts already have the ability to order the takedown of infringing material in appropriate cases. In a “notice-and-takedown” regime, no court order is required. A “graduated response” approach, on the other hand, would involve consumers being disconnected from the Internet after a number of notification letters warning that they are violating copyright.

Some labels and business organizations have expressed support for some form of graduated response regime (for example a “three-strikes” approach akin to what is being tried in France and the United Kingdom),¹⁰⁷ while ISPs, educational institutions and consumer groups have indicated that the proposed “notice-and-notice” regime, which is already being voluntarily used, is more appropriate. Intellectual property lawyer Barry Sookman takes a more robust position, arguing that the “notice-and-notice” regime may be inadequate and that a “notice-and-takedown” system “is required to effectively deal with operators of pirate sites that infringe content on a substantial scale and to deal promptly with time-sensitive postings.”¹⁰⁸

The “notice-and-notice” regime found in Bill C-11 has been present in the government’s past three attempts at copyright reform – Bills C-60, C-61 and C-32. In response to frequently asked questions regarding Bill C-60, Industry Canada noted that a “notice-and-notice” regime would be maintained “in accordance with Charter of Rights considerations.”¹⁰⁹ Indeed, concern has been raised that a “notice-and-takedown” regime could create incentives for ISPs to remove content without warning or evidence of actual infringement, which can potentially lead to a stifling of free expression.¹¹⁰ As well, the Industry Canada website argues that a “notice and takedown” regime would actually be ineffective in preventing peer-to-peer file sharing, as “notice and takedown” “typically applies only to material posted on websites. It is not well suited to files shared on peer-to-peer networks, the most prevalent source of infringing material, since the files are actually located on the computers of the persons engaged in sharing.”¹¹¹

Of note, in 2008 the Privacy Commissioner of Canada raised concerns about the privacy implications of requiring ISPs to retain personal information for the purposes of the regime.¹¹² As she observed, “PIPEDA requires that organizations retain personal information for only as long as necessary to fulfill the purposes for which the information was originally collected. Limiting the extent of data collection and period of retention is a key strategy to minimize the risk of data breaches of personal information.”

NOTES

1. [Bill C-11: An Act to Amend the Copyright Act](#), 1st Session, 41st Parliament (first reading version, 29 September 2011).
2. [Bill C-32, An Act to Amend the Copyright Act](#), 3rd Session, 40th Parliament (first reading version, 2 June 2010).
3. See “[Legislative Committee on Bill C-32](#),” *House of Commons*, to access materials connected with the committee hearings.
4. [Copyright Act](#), R.S.C. 1985, c. C-42.
5. For more information regarding copyright and related rights, see Canadian Intellectual Property Office, [A Guide to Copyrights](#), 2008; and World Intellectual Property Organization [WIPO], [Understanding Copyright and Related Rights](#), WIPO Publication 909(E), n.d.
6. Daniel Gervais and Elizabeth F. Judge with the collaboration of Mistrale Goudreau, *Le droit de la propriété intellectuelle*, Cowansville, QC, Yvon Blais, 2006, p. 10.
7. Ibid.
8. For a detailed explanation of these rights, please see WIPO, [Understanding Copyright and Related Rights](#), pp. 8–13.
9. [CCH Canadian Ltd. v. Law Society of Upper Canada](#), [2004] 1 S.C.R. 339, 2004 SCC 13.
10. Ibid., para. 48.
11. Ibid., para. 53.
12. An example of an analysis of the factors elaborated in the *CCH* decision is Giuseppina D’Agostino, [Fair Dealing After CCH](#), Copyright Policy Branch, Canadian Heritage, June 2007.
13. For an analysis of international agreements regarding copyright, please see International Bureau of the WIPO, [International Protection of Copyright and Related Rights](#), n.d.
14. A list of the international intellectual property treaties that Canada has signed, ratified or acceded to is available at Industry Canada, *Intellectual Property Policy*, “[International Treaties](#).”
15. [Berne Convention for the Protection of Literary and Artistic Works](#), 1886, as amended [Berne Convention], WIPO. Canada acceded to the Convention on 10 April 1928, and to the 1971 revision on 28 September 1998.
16. [International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations](#) [Rome Convention], 1961, WIPO. Canada acceded to the Convention on 4 March 1998, and became a party to it on 4 June 1998.

17. [Trade-Related Aspects of Intellectual Property Rights](#) (TRIPS Agreement), 1994, World Trade Organization. Canada became a party to this agreement on 1 January 1995. The TRIPS Agreement is Annex 1C of the *Marrakesh Agreement Establishing the World Trade Organization*.
18. *The North American Free Trade Agreement*, 1994, “Part Six: Intellectual Property,” [Chapter Seventeen](#), Foreign Affairs and International Trade Canada. Canada signed NAFTA on 17 December 1992, and ratified it on 23 June 1993.
19. [WIPO Copyright Treaty](#) [WCT], 1996, WIPO.
20. [WIPO Performances and Phonograms Treaty](#) [WPPT], 1996, WIPO.
21. International Bureau of the WIPO, [International Protection of Copyright and Related Rights](#), p. 17.
22. See article 6(1) of the WCT and articles 8 and 12 of the WPPT.
23. See articles 11 and 12 of the WCT and articles 18 and 19 of the WPPT.
24. Article 9 of the Berne Convention concerns the right of reproduction. Subsection 9(2) provides that “(2) It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.” [Berne Convention](#) (1886, as amended).
25. For more information about the three-step test and the limitations on and exceptions to copyright, please see, for example, Sam Ricketson, [WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment](#), 5 April 2003.
26. See, for example, House of Commons, “Legislative Committee on Bill C-32,” [Evidence](#), 3rd Session, 40th Parliament, 10 March 2011.
27. Information on the history of ACTA negotiations, including the text of the agreement, is available at Foreign Affairs and International Trade Canada: [Anti-Counterfeiting Trade Agreement \(ACTA\)](#).
28. Foreign Affairs and International Trade Canada, “[Canada Signs Historic Anti-Counterfeiting Trade Agreement](#),” News release, 30 September 2011.
29. Ibid.
30. For more information on the evolution of copyright in Canada, please consult Canadian Heritage, *General Information*, “[History of Copyright in Canada](#).”
31. Bill C-11, which received Royal Assent on 12 December 2002, clarified the retransmission rules in the Act for retransmitting over-the-air broadcast signals over the Internet. The amendments excluded from the compulsory licence in the retransmission regime those retransmitters that are subject to the CRTC New Media Exemption Order and added regulation-making powers that would allow the government to impose conditions of service on such retransmitters that, in the future, may no longer be subject to the exemption order.
32. Industry Canada administers the *Copyright Act*, while Canadian Heritage is responsible for the cultural aspects of copyright policy.
33. Industry Canada, [Supporting Culture and Innovation: Report on the Provisions and Operations of the Copyright Act](#) (Copyright Act – Section 92 Report), October 2002.
34. Minister of Canadian Heritage and Minister of Industry, [Status Report on Copyright Reform](#), 24 March 2004.
35. House of Commons, Standing Committee on Canadian Heritage, [Interim Report on Copyright Reform](#), May 2004.

36. Government of Canada, *Balanced Copyright*, "[Government Statement on Proposals for Copyright Reform](#)," March 2005.
37. [Bill C-60, An Act to amend the Copyright Act](#), 1st Session, 38th Parliament (first reading version, 20 June 2005).
38. Ronald Hirshhorn, *Economic Impact of Options for Reforming the Private Copying Regime*, Industry Canada, December 2005.
39. Paul Chwelos, *Internet Service Providers Report*, Industry Canada, 20 January 2006.
40. See Birgitte Andersen and Marion Frenz, *The Impact of Music Downloads and P2P File-Sharing on the Purchase of Music: A Study for Industry Canada*, Industry Canada, 2007. For music sales in Canada for 2007, see IFPI Market Research, [Music Market Data 2007](#), February 2008.
41. [Bill C-59, An Act to amend the Criminal Code \(unauthorized recording of a movie\)](#), received Royal Assent on 22 June 2007, and was enacted as S.C. 2007, c. 28.
42. [Bill C-61, An Act to Amend the Copyright Act](#), 2nd Session, 39th Parliament (first reading version, 12 June 2008).
43. [Digital Millennium Copyright Act](#), Pub. L. No. 105-304, 112 Stat. 2860 (28 October 1998).
44. See, for example, Peter Nowak, "[Copyright law could result in police state: critics](#)," CBC News, 12 June 2008; Jeremy de Beer, "Canada's new copyright bill: More spin than 'win-win'," *National Post*, 16 June 2008; Peter Nowak, "[Canadians divided on copyright bill: survey](#)," CBC News, 23 June 2008; and Derek Hill, "[Reaction to proposed copyright reforms mixed](#)," *Law Times*, 28 July 2008.
45. [Speech from the Throne](#) delivered by Her Excellency the Right Honourable Michaëlle Jean, Governor General of Canada, to open the 1st Session of the 40th Parliament, 19 November 2008.
46. For more information on the copyright consultations, and to access submissions, see Government of Canada, [Copyright Consultations](#).
47. [Speech from the Throne](#) delivered by Her Excellency the Right Honourable Michaëlle Jean, Governor General of Canada, to open the 3rd Session of the 40th Parliament, 3 March 2010.
48. [Bill C-32, An Act to Amend the Copyright Act](#) (2 June 2010).
49. [Speech from the Throne](#) delivered by His Excellency the Right Honourable David Johnston, Governor General of Canada, to open the 1st Session of the 41st Parliament, 3 June 2011.
50. Peter E. J. Wells et al., "[Bill C-32 – The Copyright Modernization Act](#)," Lang Michener LLP (now McMillan LLP), June 2010.
51. WCT, art. 8, "[Right of Communication to the Public](#)."
52. WPPT, art. 10, "[Right of Making Available of Fixed Performances](#)" and art. 14, "[Right of Making Available of Phonograms](#)."

53. The drafting of these two clauses, found in both Bill C-11 and Bill C-32, is slightly different from the approach taken in Bill C-61, the last attempt at copyright reform before Bill C-32. Keith Rose, then a research assistant to Michael Geist, prepared a comparison chart of C-32 and C-61, found at Michael Geist, "[Comparing the Two Copyright Bills: C-32 vs. C-61](#)." Bill C-61 contained the phrase "to communicate to the public by telecommunication," whereas Bill C-32 uses both "to make a sound recording of it available" in addition to "to communicate to the public by telecommunication." One could ask for clarification as to the relationship between the two, to determine whether the making available aspect is a part of, or separate from, the communication to the public aspect. This possible distinction was raised by an attendee at a conference on Bill C-32 held on 21 June 2010 in Montréal by the [Association Littéraire & Artistique Internationale \(ALAI\) Canada](#).
54. WPPT, art. 5, "[Moral Rights of Performers](#)."
55. In the sense of protection required in international treaties for creators from outside Canada.
56. See Government of Canada, *Balanced Copyright*, "[Copyright Modernization Act – Background](#)."
57. Claude Brunet et al., *Proposed Amendments to the Canadian Copyright Act*, Ogilvy Renault LLP (now Norton Rose LLP), 4 June 2010.
58. Ibid.
59. Ibid.
60. Print disabilities prevent people from reading standard print. They can be due to a visual, perceptual or physical disability which may be the result of vision impairment, a learning disability or a disability that prevents the physical holding of a book. Canadians with print disabilities require publications in multiple formats, such as Braille, audio, large print and electronic text. They may also require assistive technology to meet their information needs. See, for example, Library and Archives Canada, [Initiative for Equitable Library Access](#).
61. A copyright owner can elect either an award of statutory damages per section 38.1 of the Act or can make a claim for damages suffered due to the infringement plus profits that the infringer made from the infringement per section 35.
62. Wells et al., "[Bill C-32 – The Copyright Modernization Act](#)," (2010). It has been argued that a reduction in statutory damages balances the interests of copyright owners and those of users. However, this limitation may not apply if the infringement was achieved by circumventing a technological measure.
63. This approach is slightly different from the approach taken in [Bill C-61](#) (12 June 2008) (at clause 30), which set liability for non-commercial infringement at \$500, instead of the \$100–\$5,000 range found in Bill C-32. Also, Bill C-61 did not include the proportionality requirement.
64. See, for example, James Gannon, "[Top 5 Myths About the New Copyright Bill and Digital Locks](#)," 3 June 2010. James Gannon is a lawyer at the firm McCarthy Tétrault in Toronto.
65. Michael Geist, [Setting the Record Straight: 32 Questions and Answers on C-32's Digital Lock Provisions](#), June 2010.
66. Ibid., p. 7.
67. See, for example, Wells et al., "[Bill C-32 – The Copyright Modernization Act](#)," (2010).
68. [Bill C-61](#) (12 June 2008), clause 31.
69. [Bill C-60](#) (20 June 2005), clause 1.
70. WCT, art. 11, "[Obligations concerning Technological Measures](#)."

71. The last exception, regarding unlocking cellphones, is interesting, as one could say that unlocking a cellphone does not involve copyright (such as reproduction, etc., though it does involve contract law through the cellphone contract). The inclusion of an exception for the unlocking of cellphones could indicate the possibility that the prohibition on circumvention of TPMs is currently drafted in a manner that extends beyond copyright. For example, in the United States, every three years the Copyright Office reviews possible exceptions to the anti-circumvention provisions of the *Digital Millennium Copyright Act*, which are quite broad (17 U.S.C., s. 1201(a)(1)). The exemptions decided upon by the Copyright Office last for the three-year period and then must be renewed. In the November 2006 ruling, the U.S. Copyright Office stated that the “software lock” preventing customers from using the same phone with different carriers “appears to be limited to restricting the owner’s use of the mobile handset to support a business model, rather than to protect access to a copyrighted work itself.” “The underlying activity sought to be performed by the owner of the handset is to allow the handset to do what it was manufactured to do – lawfully connect to any carrier. This is a noninfringing activity by the user,” said Chief Register Marybeth Peters (Marybeth Peters, Register of Copyrights, to James H. Billington, Librarian of Congress, [“Recommendation of the Register of Copyrights in RM 2005-11: Rulemaking on Exemptions from Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies,”](#) 17 November 2006). For the Determination of the Librarian of Congress and Text of the Regulation for November 2006, see United States, Federal Register, Rules and Regulations, [“Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies,”](#) 27 November 2006, pp. 68472–68480.
72. Amanda Carpenter, [Bill C-32: Clarifying the Roles and Responsibilities of Internet Service Providers and Search Engines](#), IP Osgoode, 15 June 2010.
73. Peter Nowak, [“Copyright bill would ban breaking digital locks,”](#) CBC News, 2 June 2010; Steven Chase, [“Tory bill cracks down on copyright pirates,”](#) *The Globe and Mail*, 2 June 2010; Canadian Press, [“Sweeping federal copyright bill provokes strong reactions, for and against,”](#) *Ottawa Business Journal*, 3 June 2010.
74. Michael Geist, [“The Canadian Copyright Bill: Flawed But Fixable,”](#) 2 June 2010.
75. [“Copyright bill takes a good shot at a moving target,”](#) Editorial, *The Globe and Mail*, 3 June 2010.
76. Don Martin, [“Copyright bill a compromise that leaves no one totally happy,”](#) *National Post*, 2 June 2010.
77. [“Balancing rights on copyright,”](#) Editorial, *The Toronto Star*, 4 June 2010.
78. See, for example, Bea Vongdouangchanh, [“House ready to deal with controversial Copyright Bill,”](#) *The Hill Times*, 17 October 2011; Christine Dobby, [“Canada’s copyright overhaul and the digital locks controversy,”](#) *FP Tech Desk*, 29 September 2011; Kazi Stastna, [“Copyright changes: how they’ll affect users of digital content,”](#) *CBC News.ca*, 30 September 2011; Steven Chase, [“Law cracks down on digital piracy in Canada,”](#) *The Globe and Mail* [Toronto], 30 September 2011.
79. Jennifer Brown, [“Feds want bill C-11 pushed through as SCC prepares to hear copyright cases,”](#) *CanadianLawyermag blog*, 4 October 2011.

80. Canadian Consumer Initiative, "[Consumers' Gains in Copyright Bill Can be Taken Away by Media Companies: La Loi sur le droit d'auteur](#)," News release, Ottawa, 4 June 2010; The Retail Council of Canada, "[Retail Council of Canada welcomes introduction of Copyright Modernization Act. Industry commends Government for rejecting calls to extend blank media levy](#)," News release, Ottawa, 3 June 2010; Association of Universities and Colleges of Canada, "[AUCC welcomes new copyright bill](#)," News release, Ottawa, 3 June 2010; Canadian Association of University Teachers, "[Copyright bill restricts user rights, research and innovation](#)," News release, Ottawa, 2 June 2010; Canadian Library Association, "[Canadian Library Association Gives Passing Grade to New Copyright Legislation: User Rights Still Tempered by Digital Locks](#)," News release, Ottawa, 3 June 2010; and Canadian Museums Association, "[New Copyright Legislation: A Good Step Forward](#)," News release, 3 June 2010.
81. David Lewis Stein, "[New copyright legislation is bad news for Canadian writers](#)," *The Toronto Star*, 14 July 2010; The Writers' Union of Canada, "[Canada's Writers Demand Change to Copyright Act](#)," News release, Toronto, 8 June 2010; Association nationale des éditeurs de livres, "[Une loi sens dessus dessous qui met en péril notre économie du savoir : Le projet de loi sur le droit d'auteur C-32 constitue une atteinte sans précédent aux droits des créateurs](#)," News release, Montréal, 16 June 2010; Union des écrivaines et écrivains Québécois, "[Projet de Loi sur le droit d'auteur : les auteurs dépouillés](#)," News release, Montréal, 28 June 2010; SOCAN, "[SOCAN pleased that government has tabled new copyright legislation](#)," News release, 4 June 2010; Access Copyright, "[Access Copyright Is Deeply Concerned by the Government's Lack of Support for the Remuneration of Creators Through Collective Licensing](#)," News release, Toronto, 3 June 2010; Canadian Private Copying Collective, "[Proposed Copyright Law Fails Canadian Artists: Survey shows Canadians support fair compensation to artists and extending the levy to MP3 players](#)," News release, Toronto, 2 June 2010. Note that a comprehensive list of Canadian collective societies is accessible at Copyright Board of Canada, [Copyright Collective Societies](#).
82. Canadian Recording Industry Association, "[Copyright Bill Introduction Applauded by Canadian Record Labels: Record Labels Urge Passage of Robust Digital Copyright Protection](#)," News release, Toronto, 2 June 2010; Entertainment Software Association of Canada, "[Canadian Video Game Industry Welcomes Strong Action on Copyright](#)," News release, Toronto, 2 June 2010.
83. Sophie Milman, "[New copyright law would cut artists' earnings: Digital devices exempt from copying fee levied on blank cassettes and CDs](#)," *The Toronto Star*, 9 June 2010; Alliance of Cinema, Television and Recording Artists [ACTRA], "[Canada's New Copyright Bill A Blow To Artists: 'Half the Bill is missing'](#)," News release, Toronto, 2 June 2010; Canadian Music Creators Coalition, "CMCC: Time to Invest in Supporting Artists Instead of Focusing on Punishing Fans," 8 June 2010; Access Copyright, "[Access Copyright Is Deeply Concerned by the Government's Lack of Support for the Remuneration of Creators Through Collective Licensing](#)," News release, Toronto, 3 June 2010.; Canadian Private Copying Collective, "[Proposed Copyright Law Fails Canadian Artists: Survey shows Canadians support fair compensation to artists and extending the levy to MP3 players](#)," News release, Toronto, 2 June 2010.
84. See Michael Geist, "[Copyright Is Back: Why Canada is Keeping the Flawed Digital Lock Rules](#)," 29 September 2011; Michael Geist, "[Behind the Scenes of Bill C-32: The Committee Submissions](#)," 28 September 2010; Barry Sookman, "[Some observations on Bill C-11: The Copyright Modernization Act](#)," 3 October 2011.
85. [The Constitution Act, 1867](#), 30 and 31 Victoria, c. 3 (U.K.).

86. Emir Aly Crowne-Mohammed and Yonaton Rozenszajn, "[DRM Roll Please: Is Digital Rights Management Legislation Unconstitutional in Canada?](#)" *Journal of Information, Law & Technology (JILT)*, Vol. 2, 2009; Jeremy F. deBeer, "[Constitutional Jurisdiction Over Paracopyright Laws](#)," in Michael Geist, ed., *In the Public Interest: The Future of Canadian Copyright Law*, Irwin Law, Toronto, 2005, pp. 89–124.
87. For a summary of freedom of expression and copyright law, see Ysolde Gendreau, "[Copyright and Freedom of Expression in Canada](#)," in *Copyright and Human Rights*, ed. Paul Torremans, The Hague, Kluwer, 2004, pp. 21–36; David Fewer, "The Constitutionalizing Copyright: Freedom of Expression and the Limits of Copyright in Canada," *University of Toronto Faculty of Law Review*, Vol. 55, No. 2, 1997, p. 175; Jeremy de Beer, "[Copyright and Free Expression: Why Can't Courts Get it Right?](#)" n.d.
88. On this subject, Jane Bailey states, "[d]eepening the [Copyright] Act's restrictions on freedom of expression through anti-circumvention provisions can only serve to heighten constitutional concerns" ("[Deflating the Michelin Man: Protecting Users' Rights in the Canadian Copyright Reform Process](#)," in Geist (2005), p. 166.
89. Jennifer Stoddart, Privacy Commissioner of Canada, "[Letter with respect to possible amendments to the Copyright Act](#)," Office of the Privacy Commissioner of Canada, 18 January 2008.
90. [Personal Information Protection and Electronic Documents Act](#), 2000, c. 5.
91. The Privacy Commissioner provided the example of Sony BMG's Extended Copy Protection (XCP), a Digital Rights Management (DRM) tool intended to prevent unauthorized copying. Sony BMG products contained a particular type of copy protection for music in digital format, namely a program that secretly installed itself in the root system of the user's computer. If one of these copy-protected CDs was played on a computer connected to the Internet, it was capable of reporting back to Sony BMG information such as when the CD was played, the IP address it was being played at, and whether and how often attempts were made to copy it. Class-action lawsuits were filed in Canada and the United States, alleging violations of privacy law, breach of contract and tort claims. Interestingly, the Privacy Commissioner noted that Sony BMG announced in 2008 that it would abandon DRM measures completely, joining all other major labels in rejecting the approach.
92. Bill C-60 (20 June 2005), clause 27 (proposed subsection 34.02(1)).
93. Graham Reynolds, "[How Balanced is Bill C-32?](#)," *The Mark*, 9 June 2010.
94. Geist, [Setting the Record Straight](#) (2010).
95. Michael Geist, "[Fixing Bill C-32: Proposed Amendments to the Digital Lock Provisions](#)," 15 June 2010. Geist also provides additional legislative language for a wide range of potential reforms to the TPM provisions.
96. The proposed language follows:
 Replace the definition of "circumvent" in section 41 as follows:
 "circumvent" means,
 (a) in respect of a technological protection measure within the meaning of paragraph (a) of the definition "technological protection measure," to descramble a scrambled work or decrypt an encrypted work or to otherwise avoid, bypass, remove, deactivate or impair the technological protection measure, for any infringing purpose, unless it is done with the authority of the copyright owner; and
 (b) in respect of a technological protection measure within the meaning of paragraph (b) of the definition "technological protection measure," to avoid, bypass, remove, deactivate or impair the technological protection measure for any infringing purpose.

97. The proposed language follows:

Add subsection 41.1(5) and (6) as follows.

Lawful purpose

(5) Paragraph (1)(a) does not apply if a technological protection measure is circumvented for any lawful purpose.

(6) Paragraphs (1)(b) and (c) do not apply to a person who supplies a service to a person referred to in paragraph (5) or who manufactures, imports or provides a technology, device or component, for the purposes of enabling anyone to circumvent a technological protection measure in accordance with this Act.

98. Mihály Ficsor, "[Legends and reality about the 1996 WIPO Treaties in the light of certain comments on Bill C-32](#)," 16 June 2010.
99. Milman, "[New copyright law would cut artists' earnings](#)," (2010); ACTRA, "[Canada's New Copyright Bill A Blow To Artists](#)" (2010); Canadian Music Creators Coalition, "CMCC: Time to Invest in Supporting Artists Instead of Focusing on Punishing Fans" (2010); Access Copyright, "[Access Copyright Is Deeply Concerned](#)" (2010); Canadian Private Copying Collective, "[Proposed Copyright Law Fails Canadian Artists](#)" (2010).
100. Business Coalition for Balanced Copyright, "[The Business Coalition for Balanced Copyright welcomes the introduction of the Copyright Modernization Act](#)," News release, Ottawa, 3 June 2010; The Retail Council of Canada, "[Retail Council of Canada welcomes introduction of Copyright Modernization Act](#)" (2010). In April 2010, the Canadian Recording Industry Association (CRIA) expressed concern about the possibility of levies to "effectively launder illegally acquired music into a legal format," while not rejecting the private copying levy altogether. CRIA, "[Statement on Private Copying Levies](#)," Toronto, 23 April 2010. See also Andrew Mayeda, "Major music labels say iPod tax wouldn't be enough to protect recording industry," *The Vancouver Sun*, 22 April 2010.
101. In a 2003–2004 decision, the Copyright Board found that digital recording devices with non-removable memory, such as MP3 players and iPods, fall within the definition of an "audio recording medium" under the Act (Copyright Board of Canada, [Copying 2003–2004: Copying for Private Use, Decision of the Board](#), 12 December 2003). In December 2004, however, the Federal Court of Appeal ruled that the Board does not have jurisdiction to impose a levy on memory permanently embedded in digital audio recorders and that the levies that had been set on such devices are invalid ([Canadian Private Copying Collective v. Canadian Storage Media Alliance](#) (F.C.A.) [2005] 2 F.C. 654, 2004 FCA 424). On 28 July 2005, the Supreme Court denied the CPCC's application for leave to appeal the Federal Court's decision (Supreme Court of Canada, Bulletin of Proceedings, Judgments on Applications for Leave, 28 July 2005, #30775, [Canadian Private Copying Collective \(CPCC\) v. Apple Canada Inc. \[et al.\]](#)). On 19 July 2007 the Copyright Board decided to go ahead with its planned hearing to certify a levy of up to \$75 on iPods and other digital recording devices with non-removable memory (Copyright Board of Canada, FILE: [Private Copying 2008–2009, Copying for Private Use, Decision of the Board](#), 19 July 2007). On 10 January 2008, in a quick and brief pronouncement, the Federal Court of Appeal quashed the Copyright Board's decision, telling the Board that the Court's previous decision on the same issue from 2004 is "dispositive." Justice J. A. Sharlow of the Federal Court of Appeal, said: "I read that case as authority for the proposition that the Copyright Board has no legal authority to certify a tariff on digital audio recorders or on the memory permanently embedded in digital audio recorders. That proposition is binding on the Copyright Board. It follows that the Copyright Board erred in law when it concluded that it has the legal authority to certify the tariff that CPCC has proposed for 2008 and 2009 on digital audio recorders, and in dismissing the applicants' motions." ([Apple Canada Inc. v. Canadian Private Copying Collective](#), 2008 FCA 9 (2008)).

102. [Bill C-499, An Act to amend the Copyright Act \(audio recording devices\)](#) (first reading version, 16 March 2010).
103. Sarah Schmidt, "Ottawa rules out MP3 levy to compensate musicians," *The Edmonton Journal*, 17 March 2010.
104. Hirshhorn, [Economic Impact of Options for Reforming the Private Copying Regime](#) (2005).
105. According to Hirshhorn, when an online service provides for making a copy on a levied audio recording medium, a music purchaser may effectively compensate rights holders twice: first, when the purchaser pays a downloading fee to a blank CD that incorporates royalty costs; and second, when she or he pays the levy on the blank media purchased for copying the downloaded music. There would be no double compensation if the downloading charge applied only to the making of an initial copy on the hard drive of the computer and did not include permission to make a subsequent copy; or if the purchaser of a download only intended to retain the file on hard drive and had no need to purchase a CD or other blank recording medium.
106. At present, royalty payments are made to all music authors and publishers, regardless of nationality, but only to Canadian sound recording makers and performers.
107. Canadian Recording Industry Association (2 June 2010); Barry Sookman, "[Canada called out for weak copyright laws by IFPI and at the Heritage Committee](#)," 30 April 2010; "[Ontario business group calls on Clement for notice-and-takedown](#)," *The Wire Report*, Ottawa, 6 July 2010 (published by the *Hill Times*). See Ontario Chamber of Commerce, [Letter to the Honourable Tony Clement, Minister of Industry](#) (Re: Bill C-32, An Act to amend the Copyright Act, the Copyright Modernization Act, 2010), 28 June 2010. France's [Loi relative à la protection pénale de la propriété littéraire et artistique sur internet](#) (also known as "HADOPI," the name of the government agency created by the law) allows for the suspension of Internet connectivity for a period of time following the determination by a judge, after two warnings of illegal downloading. The law has faced a number of hurdles but seems to be moving closer to implementation while at the same time encountering greater opposition. See Benjamin Ferran, "[À l'UMP, le front des partisans de l'Hadopi se fissure](#)," *Le Figaro*, 8 July 2010. In April in the United Kingdom, MPs voted to pass the "Digital Economy Bill," which contains proposals regarding the suspension of repeat filesharers' Internet connections and includes measures that would allow politicians to block pirate websites without primary legislation. See Emma Barnett, "[MPs pass Digital Economy Bill](#)," *The Telegraph*, 8 April 2010.
108. Barry Sookman, "[Some thoughts on Bill-C-32: An Act to Modernize Canada's copyright laws](#)," 3 June 2010. See also Sookman(2011).
109. Industry Canada, Intellectual Property Policy, "[Frequently Asked Questions](#)."
110. Michael Geist, "[Canada's 'Notice and notice'](#)," p2pnet.net, 16 February 2007.
111. Government of Canada, *Balanced Copyright*, "[Questions and Answers: The Copyright Modernization Act](#)."
112. Stoddart (2008).