

# **Digital Copyright**

## **A Balanced Approach**

Prepared by

The Copyright Forum

### **Members**

Association of Canadian Community Colleges  
Association of Universities and Colleges of Canada

Association pour l'avancement des sciences et des techniques de la documentation

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Canadian Association of Law Libraries

Canadian Association of Research Libraries

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Canadian Historical Association

Canadian Home and School Federation

Canadian Library Association

Canadian Museums Association

Canadian School Boards Association

Canadian Teachers' Federation

Canadian Urban Library Council

Copyright Consortium of the Council of Ministers of Education, Canada

**DRAFT SUBJECT TO MEMBER ASSOCIATION APPROVALS**

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## *Preface*

The Copyright Forum originally drafted the recommendations in its June 2001 *Discussion Paper on Digital Copyright Issues* in the summer of 2000. Since that time, there have been significant developments (both within Canada and in other jurisdictions) relevant to the issues addressed by those recommendations.

As part of a consultation process undertaken in 2001 and 2002, Industry Canada and Canadian Heritage issued a Consultation Paper and a Focus Paper that raised a number of specific questions pertaining to digital copyright issues, and received submissions in response from a wide range of stakeholders, including member organizations of the Copyright Forum. Subsequently, the departments commissioned studies on a number of specific issues, including the economic impact of copyright reform on Internet Service Providers and on technology-enhanced learning, and set up a working group of stakeholders to address the proposed exception for educational use of the Internet.

In the United States, the *Technology, Education and Copyright Harmonization (TEACH) Act* was passed in 2002, and a second round of rulemaking on exceptions relating to technological protection measures in the *Digital Millennium Copyright Act (DMCA)* was completed in 2003. In Australia, the Copyright Law Review Committee issued a report and recommendations on contracts and copyright in 2002. In the United Kingdom, the provisions of the European Council's Copyright Directive were implemented with the coming into force of the *Copyright and Related Rights Regulations 2003*.

More recently, the decisions of the Supreme Court of Canada in the Law Society of Upper Canada case (2004 SCC 13) and the "Tariff 22" case (2004 SCC 45) have provided legal precedents of considerable significance to the issues under discussion.

In light of these developments and others, the Copyright Forum initiated a review of the recommendations made in the *Discussion Paper on Digital Copyright Issues* to determine the extent to which the recommendations in the paper needed to be revised and the supporting arguments updated. This document incorporates revisions to a number of the recommendations to the 2001 Discussion Paper and summarizes key developments relevant to those recommendations. It also identifies a number of "new" issues that have arisen since the release of the Discussion Paper in 2001. Some of these "new" issues have emerged from the Minister's report on the Section 92 review, *Supporting Culture and Innovation: Report on the Provisions and Operation of the Copyright Act*, as potential issues to be dealt with in the upcoming "first" round of copyright reform initiatives. Others have been suggested by developments in other jurisdictions.

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# Digital Copyright

## A Balanced Approach

### 1. Introduction

The Copyright Forum serves as a venue for the discussion of digital copyright issues of interest to Canadian educational institutions, libraries, archives, and museums. The Forum currently comprises sixteen national associations. The members of the participating associations are both creators and users of digital intellectual content, and a number of institutional members act as Internet Service Providers.

The institutions represented in the Copyright Forum play a major role in furthering education, learning, research, and social, cultural, and economic development in Canada. They also function as key players in the provision of public access to Canada's cultural and heritage resources. As such, they are recognized partners and stakeholders in a broad range of strategic government initiatives aimed at:

- accelerating the transition to a knowledge-based economy;
- providing young Canadians more and earlier opportunities to get involved, develop their talents, and expand their skills;
- providing Canadians digital access to their cultural and historical heritage;
- improving the knowledge infrastructure by attracting the best researchers and encouraging Canadian graduates to put their talents to work here at home;
- improving access to Internet-based content through schools and libraries; and
- positioning Canadians to compete effectively in a global knowledge-based economy.

The associations participating in the Copyright Forum believe that the role played by educational institutions, libraries, archives, and museums must be viewed as a key element in any consideration of public policy related to the digital environment. In that context, it is essential to ensure that the *Copyright Act* maintains an appropriate balance between the rights of creators to benefit from the use of their works and the rights of users to access and use those works on reasonable terms, as articulated by the Supreme Court of Canada decision in the Law Society of Upper Canada case.<sup>1</sup>

The purpose of this discussion paper is to outline the Forum's perspective on major issues that have to be addressed in revising the *Copyright Act* in order to make it a more effective instrument for achieving public policy objectives in a digital environment. The paper highlights the key issues, sets out a number of principles underlying the Forum's approach, and makes a series of specific recommendations relating to the revision of the *Copyright Act*.

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<sup>1</sup> 2004 SCC 13.

## 2. Context and Key Issues

As bandwidth and transmission speeds increase and compression technologies become more sophisticated, new opportunities emerge. Digital technologies are the catalyst — and the means — for enormous changes in the way Canadians function at work, at home, and in schools, libraries, archives, and museums.

The trend toward globalized economies, itself deeply influenced by technological advances, is now being paralleled by the internationalization of copyright laws applying to digital technology, particularly the Internet. Canada has signed but not yet ratified two new international agreements on copyright prepared under the auspices of the World Intellectual Property Organization (WIPO). By signing these treaties, Canada has signalled its intention to take the next step of bringing its legislation into conformity with the obligations in the treaties and then ratifying them. These treaties raise a number of issues for Canadian copyright law and may be the impetus for significant amendments to the law. However, the WIPO treaties form only part of the overall context for change. Outlined below are other elements that form an integral part of this context.

### *Balance*

The Canadian *Copyright Act* provides a carefully crafted balance between two competing public policy objectives. The first objective is to provide adequate and effective legal protection for creators of literary, dramatic, musical and artistic works in order to encourage further creation and dissemination of new creative works to the public. The second objective is to ensure that these works are as accessible as possible for the benefit of society as a whole. The *Copyright Act* provides creators with legal rights over their creations to enable them to enjoy the fruits of their labour — in economic terms: to be paid for the use of their work. The *Act* provides a counterbalance by limiting the rights of creators and by providing users with rights of access to those works for purposes of education, research, and private study. Recent Supreme Court of Canada decisions in the *Law Society* and “*Tariff 22*” cases recognize that user rights are an integral part of the *Copyright Act*.

In a digital environment, where many creators are concerned about the ease with which works can be reproduced and transmitted electronically, the task will be to amend the *Copyright Act* in a way that maintains appropriate incentives for creators while permitting reasonable use of digitally formatted works. From the Forum’s perspective, it is essential to address both sides of the issues emerging from the application of digital technologies simultaneously. User rights have to be addressed at the same time as new protections and new sanctions are considered.

There is also another dimension to the balancing issue — the public domain. Copyright law grants a limited monopoly to copyright owners; copyright protection does not extend beyond original expression, nor does it hold for an indefinite period of time. Facts and ideas remain outside the scope of copyright, and at the end of a specified period of time even protected works fall into the public domain. In the Forum’s view, safeguarding the public domain is as fundamentally important as protecting the rights of individual owners of copyright.

### ***Licensing***

Licensing, under the rubric of contract law, is being used more and more frequently to control the distribution of digital products. Increasingly, contract law is taking the place of copyright law. There is, however, a very important difference between copyright and contract law. Copyright law involves a carefully considered public policy balance that is not reflected in contract law. As a result, standard form contracts used in merchandising digital products often introduce a significant imbalance with respect to the interests of the parties to the contract.

This issue is addressed in further detail under section 4.1.

### ***Technological Protection***

In addition to contractual means, copyright owners now have at their disposal an array of technological measures that can be used to protect their rights. Such measures, however, also have the potential to distort the balance between the interests of owners and the interests of users that is reflected in copyright law.

Copyright owners argue the case for an outright ban on any bypassing of encryption or other technological protection measures in the belief that such activity, if permitted, would lead to widespread piracy. Many users of digitally formatted works take the position that an outright ban on the circumvention of technological protection measures would prevent the exercise of fair dealing and statutory exceptions such as preservation copying, as well as restrict access to public domain material.

The complexities of this issue are discussed further under section 4.2.

### ***Technology-Enhanced Learning***

Although copyright law has always controlled the use of material by educators, digital technology is pushing copyright into the forefront because, in varying degrees, traditional distance learning and school-based forms of education are being supplemented by on-line instruction in which learning and teaching occur on the World Wide Web. Learners of all ages can engage in learning through computers on campus, at work, or at home. They are able to access directly materials and experts electronically anywhere in the world. Learning materials themselves may now integrate text, graphics, sound, and images in ways never before possible.

Copyright law has not kept pace with these technological changes. The *Copyright Act* needs amending to allow educational opportunities created by digital technology to be realized. Students and teachers must be able to use the Internet and other new information and communication technologies (ICT) legally (without infringing copyright) if they are to develop the skills required to position Canada in the global information and knowledge economy.

This issue is addressed further under section 4.3, with reference to a proposed exception for educational use of the Internet.

### ***Digital Communications***

Although the operational aspects of digital technologies are complex, technical exceptions dealing with the operation of digital networks are extremely important in the overall process of

amending the copyright law to take into account digital technologies. In the European Union, the United States, and Australia, the scope and substance of these technical provisions formed an important part of the legislative debate on amendments to their respective copyright laws. Canada's copyright laws are also in need of a number of amendments to address the technical realities of a digital environment.

Issues relating to service provider liability are discussed further under section 4.4.

Issues relating to the making of temporary copies in the context of electronic transmission, browsing, and caching are discussed further under section 4.5.

### ***Administration of Copyright***

Although this discussion paper does not address the issue of administration of copyright in detail, it is essential to underscore the importance of developing administrative systems to facilitate the clearance of rights for use of works in a digital environment without, in the process, giving an inappropriate degree of control to rights holders and collectives, as extended licensing does.

## **3. Guiding Principles**

The following core principles form the basis for the Copyright Forum's recommendations:

### ***Balance in Copyright Law***

Copyright law must serve the public interest by providing a reasonable balance between the rights of copyright owners and the rights of citizens to reasonable access to copyrighted works.

### ***Primacy of the Copyright Act***

The rights granted to users of copyright content by the *Copyright Act* must not be allowed to be unilaterally overridden by contract. The contractual licensing of copyright works does not replace or fully achieve the public policy objectives of copyright law.

### ***Technological Neutrality***

Copyright laws must remain "technology neutral" in the sense that the provisions they embody ensure that technological developments detract neither from the rights of copyright owners nor from the legitimate rights of users to have reasonable access to protected works.

### ***The Right to Read***

Nothing in the *Copyright Act* should impede an individual's fundamental freedom to read, view, or listen to material protected by law.

### ***The Right to Lend***

The non-profit public lending of legally obtained copyright content is one of the cornerstones of a democratic society and must be permitted to continue irrespective of the format of the content.

### ***A Robust Public Domain***

A robust public domain is an essential element of an informed and participatory society.

### ***Facts are Not Copyrightable***

It is essential that individuals maintain their ability to access and use facts. It would be inappropriate to extend a *sui generis* property right to compilations of facts.

### ***Privacy***

The right of individuals and institutions to retain their privacy relating to choice of reading or research content must be protected.

## **4. Introduction of New Provisions**

### **4.1 Interface between Copyright and Contracts**

#### **Recommendation**

**Amend the *Copyright Act* to provide that an agreement, or a provision in agreement, that excludes or modifies, or has the effect of excluding or modifying the operation of specified exceptions, has no effect.**

**Amend the *Copyright Act* to prevent a copyright owner from making it a condition of access to a work or other subject-matter that users will not avail themselves of a circumvention device or service for the purpose of doing an act that is not an infringement of copyright.**

When a person or institution buys a digital product, the purchaser is usually obliged to enter into a contract with the digital product vendor. This type of contract, called a “standard form agreement,” is drafted entirely by the vendor without consultation or negotiation with the purchaser. Examples are a “shrink wrap licence” in retail transactions and a “click wrap licence” or “Web wrap licence” in on-line transactions. By breaking open the cellophane packaging or clicking the mouse after loading the program, the purchaser may be required to agree to a contract prohibiting copying or lending. The increasing use of standard form agreements to govern the use of digital products is creating a growing number of conflicts between the prohibitions embedded in contracts and uses permitted by copyright law.

The lending of CD-ROMs by Canadian libraries is illustrative of this problem. The Canadian *Copyright Act* provides copyright owners with a bundle of exclusive legal rights allowing them to control specified uses of their works. One of these rights is the right to “rent” a computer program. Since many CD-ROMs contain computer programs, many of them, for the purposes of the *Act*, are protected as computer programs. However, the rental right in the *Copyright Act* was drafted so that the right to rent was balanced by the right to lend. The rental right in the *Copyright Act* does not apply if the activity does not involve a financial “gain,” which makes it inapplicable to lending activities. The public policy balance was established so that lending would be free of the copyright owner’s control. Vendors are using contract law in the form of shrink wrap licences to establish a lending right when the legislature has denied them this right in the copyright law.

This raises the question of what can be done to ensure that the normal activities of educational institutions, libraries, archives, and museums that are permitted by the *Copyright Act* will not be undermined by the imposition of contractual obligations over which an institution has no

effective control. A legislated solution is recommended, using the United Kingdom's *Copyright Act* for guidance.

The United Kingdom's *Copyright Act* addresses a similar, but not identical, issue to the one flagged above. Section 36(4) of the U.K. *Copyright Act* provides:

36(4) The terms of a licence granted to an educational establishment authorizing the reprographic copying for the purpose of instruction of passages from published literary, dramatic or musical works are of no effect so far as they purport to restrict the proportion of a work which may be copied (whether on payment or free of charge) to less than that which would be permitted under this section.

This section has the legal effect of rendering licence terms ineffective insofar as they purport to override statutory provisions in the copyright law, thus preserving the carefully thought-out policy balance in the U.K. copyright law. Section 36(4) has been used as a model for a proposed legislative solution that would ensure, for example, that the terms of a standard form licence prohibiting lending a work are of no effect as far as they purport to restrict lending that is permitted under the copyright law.

In the Copyright Forum's 2001 Discussion Paper, the problem of contracts overriding exceptions and limitations in the copyright law was addressed solely in relation to standard form contracts. However, any contract can be used in this way. Therefore the issue of the interface between copyright and contract law needs to be addressed in a broader context.

The ability to license or contract with users is viewed by some rights holders as a reason for eliminating existing exceptions and for not legislating new exceptions. The view is that exceptions in the public interest should not be legislated as long as some mechanism for payment can be provided by rights holders. The Copyright Forum takes the position that "licensing is not always the answer." Instead, copyright reform must be based on a broader policy context that encompasses user rights and the public interest as recognized by the Supreme Court of Canada in the Law Society and "Tariff 22" cases.

Licensing, contracts, and technological protection measures are analogous methods of rendering void the exceptions in the *Copyright Act*. All three have the potential to irrevocably upset the balanced structure of rights and exceptions in the existing copyright law. The appropriate balance must be a matter of public policy, which is determined on its merits by Parliament. In some cases, the public interest prevails; in others, the rights of copyright owners take precedence. But in all cases, the process of copyright reform requires careful decisions on the appropriate public policy balance. The existence of technology that can limit access, the use of contracts, and the possibility that some form of licensing exists or might exist at some time in the future, are not valid reasons to void the exceptions in the *Act* or to upset the carefully crafted public policy balance set by Parliament.

This raises the question of what can be done to ensure that the normal activities of educational institutions, libraries, archives, and museums that are permitted by the *Copyright Act* will not be undermined by the imposition of contractual or licensing obligations or technology over which an institution has no effective control. A legislated solution is recommended modelled on section 36(4) of the United Kingdom *Copyright Act*.

In Australia, the Copyright Law Review Committee considered the issue of whether contracts were being used by copyright owners to modify the exceptions in the copyright law of Australia.

In April 2002, the Copyright Law Review Committee, on the basis of the evidence that had been submitted during its inquiry, concluded that contracts were being used to exclude or modify the copyright exceptions. The Committee concluded that in the event such contracts were found to be enforceable under Australian law, the balance between owners and users would be displaced in important respects. The enforceability of copyright-related contracts remains unsettled under Australian law. The Copyright Law Review Committee made two recommendations to preserve the integrity of the exceptions in the law. First, that the *Copyright Act* be amended to provide that an agreement, or a provision of an agreement, that excludes or modifies, or has the effect of excluding or modifying the operation of a number of exceptions, has no effect. Second, that the *Copyright Act* be amended to prevent a copyright owner from making it a condition of access to a work or other subject-matter that users will not avail themselves of a circumvention device for the “permitted purpose” of doing an act that is not an infringement of copyright under specified sections of the *Copyright Act*. “Permitted purposes” includes certain non-infringing acts set out in the *Copyright Act* such as library preservation and system administration.<sup>2</sup>

## 4.2 Technological Protection Measures

### Recommendation

**Legal protection against the circumvention of technological protection measures should apply only to technological protection measures that effectively restrict an act that:**

- (a) under Canadian law, only the author of the work, the performer of the performance, or the maker of the sound recording has the right to do or to authorize; and which
- (b) the author of the work, the performer of the performance, or the maker of the sound recording has not authorized the user to do.

**Legal protection against the circumvention of technological protection measures should not apply to technological protection measures that effectively restrict an act that:**

- (a) is permitted by Canadian law; or
- (b) the author of the work, the performer of the performance, or the maker of the sound recording has authorized the user to do.

**Legal protection against the circumvention of technological protection measures should not apply to technological protection measures that:**

- (a) are designed to collect and/or disseminate personal information about the person accessing or using the work, performance, or sound recording; and
- (b) do not provide conspicuous notice of such collection or dissemination to the person accessing or using the work, performance, or sound recording; or
- (c) do not provide the person accessing or using the work, performance, or sound recording the capability of preventing or restricting such collection or dissemination provided the circumvention is carried out for the sole purpose of preventing the collection and/or dissemination of personal information.

**If a person circumvents a technological protection measure to which legal protection applies (as stipulated above), the author of the work, the performer of the performance, or the**

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<sup>2</sup> The text of the Committee’s report is available on-line at:

<<http://www.law.gov.au/www/clrHome.nsf/AllDocs/5EC397B374406C04CA256C4F0006F070?OpenDocument>>.

**maker of the sound recording should have the right to bring an action against the person who effected the circumvention.**

**The legal remedies available to an author, performer, or maker of a sound recording who brings an action against a person or persons (as stipulated above) for circumvention of a legally protected technological protection measure should parallel those set out in the *Copyright Act* as civil remedies for infringement of copyright.**

**A user who is prevented by a technological protection measure from doing an act that is**  
**(a) permitted by law or**  
**(b) authorized by the author of the work, performer of the performance, or maker of the sound recording**  
**should have recourse to seek an order (issued either by the Minister or by the court) directing the author, the performer, or the maker of the sound recording to make available the means by which the user can carry out that act.**

Both the WIPO *Copyright Treaty* and the WIPO *Performances and Phonograms Treaty* set out obligations on states that join the treaties to provide adequate legal protection and effective legal remedies against the circumvention of technological protection measures used by authors to protect their copyright. Technological protection measures envisaged in these treaty obligations include passwords, encryption, signatures, access codes, and key systems.

Options under consideration in Canada are (a) an outright ban on any devices that could be used to circumvent technological protection measures employed by copyright owners to protect their works or (b) sanctions against the use of such devices for purposes of infringing copyright. Educational institutions, libraries, archives, and museums are concerned that an outright ban on such devices would undermine fair dealing, prevent the exercise of other statutory exceptions such as preservation copying, and restrict access to public domain material.

Institutions whose role is to acquire, preserve, and make available material of permanent value must consider the issue of access in the future, potentially for hundreds of years. The *Copyright Act* provides a number of exceptions that permit use of copyright material by such institutions for specific purposes (e.g., for the management and maintenance of collections, to enable fair dealing by patrons, and in carrying out statutory obligations under access or privacy legislation). Making it illegal to have access to devices that might be needed to circumvent technological protection measures in order to make legitimate use of a work thwarts the intention of the exceptions that support such uses in both the short and long term.

Libraries, archives, and museums have an additional concern that by the time a work eventually falls into the public domain, the technology needed to “unlock” its content may no longer be readily available. If there is an outright ban on devices that might be needed to circumvent any technological measures that had been employed by the copyright owner to protect the work, the term of protection could effectively be extended indefinitely. In other words, a work that by law should fall within the public domain may in practice remain inaccessible.

If the experience in other countries is any example, amendments dealing with technological protection measures will be controversial.

The passage of the digital copyright amending legislation in the United States in 1998 illustrates clearly the issues being faced by countries implementing the treaty obligations on technological protection measures. Although the *Digital Millennium Copyright Act* outlaws software devices

used to circumvent technological protection measures, it postponed implementation of the sections prohibiting circumvention of technological protection measures until October 2000.<sup>3</sup> The postponement was prompted by strongly divergent views from competing commercial and public interest groups, and was intended to give the Librarian of Congress time to assess whether users, including libraries and educational institutions, would be adversely affected in their ability to make non-infringing uses of a particular class of copyright works.

In Australia, section 116A of the *Copyright Amendment (Digital Agenda) Bill 1999*, which received Royal Assent in August 2000, makes civil and criminal remedies available to copyright owners against those who make or import devices capable of circumventing effective technological protection measures. This prohibition against making and importing these devices does not apply to the making or importation of the devices where the use of the device is for a “permitted purpose,” which includes certain non-infringing acts set out in the *Copyright Act* such as library preservation and system administration. The actual use of circumvention devices and services is not specifically prohibited, although a copyright owner may bring a civil action for conversion or detention in relation to any circumvention device used to make infringing copies. The report of the Australian Parliamentary Committee that studied the Bill noted that copyright owners opposed exceptions for “permitted purposes” altogether, while copyright users advocated the expansion of “permitted purposes” to include all non-infringing purposes. The committee concluded that an appropriate balance had been struck between copyright owners and users in specifying key non-infringing uses.

A different approach had been taken in the European Union. Article 6 of the European Commission’s draft *Directive Harmonizing Aspects of Rules on Copyright and Related Rights in the Information Society* proposed to explicitly forbid circumvention of technological protection measures, although a person would have to have knowledge, or have reasonable grounds to know, that he or she was engaging in circumvention of technological protection measures.

Given international developments at the time, the Forum recommended in its 2001 Discussion Paper that Canada postpone taking a position on the issue of technological protection measures until a clearer international trend was established and the impact on stakeholders had been fully assessed. At the time of drafting that recommendation, very few other jurisdictions had implemented the WIPO treaty provisions relating to technological protection measures. In the United States, the *Digital Millennium Copyright Act* (DMCA) had been passed, outlawing software devices to circumvent technological protection measures, but implementation of the provisions in the *Act* prohibiting circumvention had been postponed pending a rulemaking decision by the Librarian of Congress on classes of works to be exempted.<sup>4</sup> In Australia, the *Copyright Amendment (Digital Agenda) Bill 1999* amending the *Copyright Act* had just received royal assent, making provision for both civil and criminal remedies against the making and importation of circumvention devices, but allowing for the making or importation of circumvention devices if used only for a “permitted purpose” as specified in the *Act*. Among the permitted purposes were uses set out under exceptions for libraries and archives, exceptions for educational institutions, and exceptions for institutions serving persons with disabilities.<sup>5</sup>

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<sup>3</sup> On October 27, 2000, the Librarian of Congress, on the recommendation of the Register of Copyrights, released recommendations on exemptions from the prohibition on circumvention of technological measures that control access to copyrighted works. These recommendations can be found on-line at <<http://www.loc.gov/copyright/1201/anticirc.html>>.

<sup>4</sup> The text of the relevant section of DMCA is available on-line at: <<http://www.copyright.gov/title17/92chap12.html#1201>>.

<sup>5</sup> The text of the relevant section of the Australian *Copyright Act* is available on-line at:

Since then, there have been two rounds of rulemaking on exemptions from the prohibition against circumvention under the DMCA. In the first round, which took effect in October 2000, two classes of works were exempted: compilations consisting of lists of Web sites blocked by filtering software; and literary works (including computer programs and databases) protected by access control mechanisms that fail to permit access because of malfunction, damage, or obsolescence. In the second round, which took effect in October 2003 and superseded the rules issued in October 2000, the scope of the exemptions pertaining to lists of Web sites blocked by filtering software and to works protected by access control mechanisms that malfunction, etc., were both narrowed. Two additional classes were also exempted: the first covers computer programs and video games distributed in formats that have become obsolete and that require the original media or hardware as a condition of access; the second covers literary works distributed in e-book format where all existing editions of the work have access controls preventing the use of the read-aloud function or the use of screen readers to render the text into specialized formats.<sup>6</sup>

In Europe, the *Directive on the Harmonization of Certain Aspects of Copyright* was finalized and issued by the European Council in 2001. The Directive obligates member states to provide adequate legal protection against the circumvention of effective technological protection measures and the manufacture, import, distribution, sale, etc. of devices and services primarily designed for the purpose of enabling or facilitating circumvention. However, the Directive also obligates member states to ensure that rights holders make available to users the means of benefiting from certain exceptions or limitations provided for in national law where the user has legal access to a protected work or subject matter. Among the classes of exceptions and limitations covered by the provision are those pertaining to libraries, archives, museums, and educational institutions that are non-commercial in nature, those pertaining to illustration for the purposes of teaching or scientific research, and those pertaining to persons with disabilities.<sup>7</sup>

In 2003, the United Kingdom implemented the WIPO treaty provisions by issuing the *Copyright and Related Rights Regulations 2003*. The provisions relating to technological protection measures incorporated in the regulations parallel those of the EC Directive. Under the U.K. regulations, a user or a representative of a class of users who have lawful access to a work or subject-matter and are prevented by a technological protection measure from carrying out a permitted act may issue a notice of complaint to the Secretary of State. The Secretary of State may subsequently issue directions to the copyright owner or exclusive licensee to ensure that the complainant is provided with the means of carrying out the permitted act. Permitted acts include those pertaining to libraries and archives, to educational uses, and to fair dealing for purposes of research and private study. The complaint provisions do not apply, however, to works "made available to the public" on agreed contractual terms.<sup>8</sup>

There are basically three different models on which Canada's implementation of the WIPO treaty provisions on technological protection measures could draw. Under the U.S. model, circumvention devices are outlawed categorically and circumvention is prohibited except in the case of certain classes of works that are very narrowly defined. Under the Australian model, the

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<[http://www.austlii.edu.au/au/legis/cth/consol\\_act/ca1968133/s116a.html](http://www.austlii.edu.au/au/legis/cth/consol_act/ca1968133/s116a.html)>.

<sup>6</sup> The text of the October 2003 rules is available at: <<http://www.copyright.gov/1201/>>.

<sup>7</sup> The text of the Directive is available on-line at:

<[http://europa.eu.int/smartapi/cgi/sga\\_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=32001L0029&model=guichett](http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=32001L0029&model=guichett)>.

<sup>8</sup> The text of the relevant section of the U.K. regulations is available on-line at:

<<http://www.legislation.hmso.gov.uk/si/si2003/20032498.htm#24>>.

manufacture and importation of circumvention devices are prohibited, except in cases where they are to be used for permitted purposes as specified in the *Act*. Circumvention is allowed where it is done for those same permitted purposes. Under the U.K. model, existing provisions relating to search warrants and forfeiture of unauthorized decoders have been extended to cover circumvention devices. Circumvention is prohibited, but a complaint mechanism has been put in place providing users with recourse against copyright owners who use technological protection measures to prevent them from exercising certain permitted acts.

### **4.3 Educational Use of the Internet**

#### **Recommendation**

**Amend the *Copyright Act* to permit an educational institution or a person acting under its authority, including a student, to do the following acts in relation to all or part of a work or other subject-matter that has been made publicly available on a communication network, provided the act is done in a place where a student is participating in a program of learning under the authority of an educational institution, is done for educational or training purposes and is not for profit, and provided that the source is mentioned, and, if given in the source, the name of the author, performer, maker or broadcaster:**

- (a) use a computer for reproduction, including making multiple reproductions for use in the course for instruction;**
- (b) perform in public before an audience consisting primarily of students of the educational institution, instructors acting under the authority of the educational institution, or any person who is directly responsible for setting curriculum for the educational institution; and**
- (c) communicate to the public by telecommunication to or from a place where a person is participating in a program of learning under the authority of an educational institution.**

**The term “publicly available” should be defined to mean, for the purposes of this exception, a work or other subject-matter that is communicated to the public by telecommunication, with the consent of the copyright owner, without expectation of payment, and without any technological protection measures such as a password, encryption, or similar techniques intended to limit access or distribution, or a continuously visible symbol notifying users that the material cannot be used for educational purposes.**

**The exception should not apply if the educational institution or a person acting under its authority has knowledge, or reasonable grounds to suspect, that the work or other subject-matter has been made available to the public on a communication network without the consent of the copyright owner.**

The purpose of the exception for educational use of the Internet is to permit students and teachers to make effective use of the Internet as part of a program of learning. This includes copying certain material from the Internet, performing music or a play on-line for students, incorporating text or images in assignments, and exchanging materials with teachers or other students electronically.

The recommended exception is not open-ended. To be entitled to use the exception, a student or teacher would need to be participating in a program of learning under the authority of an educational institution. The scope of the exception is also limited by the condition that the

material must have been made “publicly available” on a communications network by or with the authority of the copyright owner without restrictions on access to it.

These conditions of entitlement to the exception are very important. The challenge is to devise an exception that permits students and teachers to use digital technologies to their fullest potential as an educational tool while at the same time ensuring that the rights of the copyright owner to exploit his or her works in the marketplace are not impeded. It would be inappropriate for the exception to cover uses for which educational institutions currently pay. Examples include subscription databases, licensed software, purchased CD-ROMs, and on-line courses and curriculum resources that include copyright materials.

However, use of material made freely available on the Internet should be covered by an exception for educational use. Students and teachers routinely copy material from the Internet for class work and assignments. In fact, teachers encourage this practice and the material, once copied, is communicated by e-mail, on a regular basis, between students and teachers.

The argument for a new exception covering educational use of the Internet is based on the following considerations:

- a negative financial impact on copyright owners resulting from this exception is unlikely since it would only apply to material that is put on the Internet without any expectation of payment;
- even if the assumption regarding expectation of payment is incorrect, blanket licensing is incompatible with a global Internet comprised of billions of copyright owners making their works publicly available;
- obtaining copyright clearance for real-time classroom use of the Internet by students and teachers is not practical or possible within any acceptable time limits; if a student wants to include an image or text from the Internet in a class assignment, there is no time to obtain permission, even if the copyright owner can be identified and contacted, since copyright owners of digital works can come from all over the world;
- the recommended exception would not be available if the copyright owner has taken steps to prevent access to the material by using passwords, encryption, or other technological protection measures; it would only apply to material placed on the Internet with unrestricted access;
- the federal government invests millions of dollars in projects designed to develop Internet skills among Canadian students while current policy, as reflected in the copyright law, makes much of what students do under these federally funded projects illegal.

Since this exception applies only to material made publicly available without expectation of payment for use, the exception does not violate the provision of the Berne Convention prohibiting the introduction of an exception that conflicts with the normal exploitation of the work or unreasonably prejudices the legitimate interests of the author. When an author makes a work publicly available on-line, without seeking compensation or restricting access, there is no economic exploitation envisaged. The recommended exception cannot conflict with an exploitation that does not exist or prejudice the interests of a copyright owner who has already implicitly authorized use on the Internet without restriction.

An issue arising in connection with the definition of “publicly available” is how to address the situation where a work has been communicated without the consent of the copyright owner. A teacher or student using the exception will not know whether a work has been communicated with or without “the consent of the copyright owner.” Yet a requirement that the work be

communicated with the copyright owner's consent is a reasonable safeguard in the exception from the copyright owner's point of view. It is recommended that the teacher or student be required to have knowledge that the work or other subject-matter was communicated without the copyright owner's consent before she or he loses the benefit of the exception for educational use of the Internet.

The changes in the Forum's recommendation dealing with the educational use of the Internet were proposed by education organizations during the deliberations of the *Working Group on Copyright and the Educational Use of the Internet* (the "Working Group") formed by Industry Canada and Canadian Heritage. The Working Group met over a six-month period between December 2002 and June 2003. The Working Group was comprised of representatives of creators, rights holders, and educational organizations.

The federal government published *Copyright and the Educational Use of the Internet, Working Group's Report, Follow-Up to the December 11-12, 2002 Consultation* on December 8, 2003. The two proposed changes in the Forum's recommendation on the educational use of the Internet are reflected in the government report.

The first change addresses the concern of creators and rights holders that requiring them to use a technological protection measure to prevent educational use would prevent all Internet users — including users whom the Web site was intended to attract — from accessing the Web site. To alleviate this concern, education organizations collectively proposed that creators and rights holders could, as an alternative to a technological protection measure, use a continuously visible symbol stating that educational use was prohibited. Under this alternative, only educational users would be barred from using publicly available material. The symbol would have the legal effect of making the educational use of the Internet exception inapplicable. Creators and rights holders did not accept this proposal. The creator/rights holder position is that they should not be required to do anything (including posting a symbol) to prevent the use of their material, and in all cases advance permission should continue to be required before any use can be made of material protected by copyright, including publicly available material on the Internet.

The second change deals with posting of material on the Internet without the consent of the copyright owner. In Working Group meetings, creators and rights holders were concerned that the proposed exception for educational use of the Internet would cover material posted on the Internet without the consent of the copyright owner. This concern is addressed in the current Copyright Forum paper by providing that the exception does not apply if the educational institution or a person acting under its authority has knowledge that the work or other subject-matter has been made available to the public on a communication network without consent of the copyright owner. Copyright holders and creators were concerned that actual knowledge is too difficult to prove. To meet this concern, education representatives proposed that the recommendation be amended to provide that the exception does not apply if the user of the Internet has reasonable grounds to suspect that the material was posted without consent.

Finally, a recent economic impact study commissioned by Industry Canada on technology-enhanced learning: *Assessing the Economic Impact of Copyright Reform in the Area of Technology-Enhanced Learning*<sup>9</sup> concludes that the amendments being proposed by education organizations in the area of technology-enhanced learning, including the exception for educational use of the Internet, would likely produce significant benefits while having minimal

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<sup>9</sup> The text of the report is available on-line at:  
<[http://strategis.ic.gc.ca/epic/internet/inippd-dppi.nsf/en/h\\_ip01074e.html](http://strategis.ic.gc.ca/epic/internet/inippd-dppi.nsf/en/h_ip01074e.html)>.

negative economic impact on creators and rights holders: "...the potential decline in revenues from 'excepting' Canadian educational institutions would be very small and have an insignificant impact on expected economic returns to producers and creators" (page 34).

#### **4.4. Liability of Internet Service Providers**

*Note: Sections 4.4 (Service Providers-Hosting) and 4.5 (Temporary Copies) of the Forum's 2001 Discussion Paper related largely to the issue of limiting the liability of institutions that act as Internet Service Providers (ISPs). The federal government's 2001 Consultation Paper on Digital Copyright Issues categorized these issues as the "Liability of Internet Service Providers" or "Liability of Network Intermediaries." Similarly, the 2003 report by the Minister of Industry entitled Supporting Culture and Innovation: Report on the Provisions and Operation of the Copyright Act (the "Section 92 report") included these issues under the heading "ISP Liability." In this updated version of the Discussion Paper, section 4.4 has been re-titled "Liability of Internet Service Providers" and the subsections formerly under section 4.5 (Temporary Copies) dealing with transmission, routing, and providing connections or access, automatic caching, and intentional caching have been moved to section 4.4. A new subsection on peer-to-peer file-sharing has also been added to section 4.4. The subsection on browsing, formerly included under section 4.5 (Temporary Copies), has been re-titled as section 4.5 "Transient Copies."*

##### **(a) Hosting**

##### **Recommendation**

**Amend the *Copyright Act* to permit a service provider to store a work or other subject-matter whose content is provided by, and stored at the request of, a recipient of the service as long as:**

- (a) the service provider does not have knowledge that the activity is infringing;**
- (b) the service provider is not aware of facts or circumstances from which infringing activity is apparent; and**
- (c) the service provider, upon obtaining knowledge or awareness that the activity is alleged to be infringing, acts expeditiously to communicate the allegation of infringement to the recipient of the service who provided the content.**

A service provider should be under no obligation to monitor content provided by, and stored at the request of, a recipient of its service, nor be required to seek facts or circumstances indicating infringing activity.

The term "service provider" should be defined in the *Copyright Act*.

Many educational institutions, libraries, archives, and museums now provide Internet services to their respective teachers, students, and patrons. A clear definition of the term "service provider" is required in the *Copyright Act* to ensure that these institutions qualify for the purposes of any exemption aimed at insulating service providers from the activities of the users of their Internet services.

A recommended model for a definition of "service provider" is the U.S. *Digital Millennium Copyright Act*, which defines the term as follows:

"service provider" means

- (a) an entity offering the transmission, routing, or providing of connections for digital on-line communications, between or among points specified by a user, of material of the user's choosing, without modification to the content of the material sent or received.
- (b) a provider of on-line services or network access, or the operator of facilities therefor, and includes an entity described in (a).

One of the key functions of service providers is to host content, such as the Web pages of subscribers, over which the service provider exercises no control. It is impossible, in practice, to monitor or screen the activities of users of network services. On that basis, service providers need legal protection similar to that already given under the law to "common carriers," such as telephone companies, for infringements committed by their patrons. This view is consistent with the *Agreed Statements Concerning the WIPO Copyright Treaty*, which states that the mere provision of physical facilities for enabling or making a communication does not in itself amount to a communication. This view is also consistent with the December 1999 decision of the Copyright Board of Canada on "Tariff 22", in which the Board concluded that a service provider should be able to benefit from the common carrier exemption as long as it merely provides facilities and its activities fall short of communicating or authorizing the communication of a work or other subject-matter. On appeal, the Supreme Court of Canada held that the common carrier exemption in section 2.4(1)(b) applies to an Internet Service Provider acting solely as an intermediary.<sup>10</sup>

Since it is impossible, in practice, to monitor or screen the activities of users of network services, educational institutions, libraries, archives, and museums acting as service providers should have no obligation to monitor what is transmitted or to seek facts or circumstances indicating illegal activity. The Copyright Forum's recommendation in this regard is based on Article 15(1) of the European Union's *Directive on Electronic Commerce*. The European Union's approach is preferred over that of the United States, which is viewed as being too complex. The Forum recommends, however, that there not be a provision relating to temporary surveillance activities, as is proposed in Article 15(2) of the European Union's *Directive on Electronic Commerce*.

There is one key area where there has been a change in position since the recommendation on hosting was first put forward by the Forum in 2001. The original section 4.4 of the Forum's Discussion Paper proposed that an Internet Service Provider should have no liability for a work hosted on its system if, among other things, the service provider, "upon obtaining knowledge or awareness that the activity is alleged to be infringing, investigates the activity, and if it determines that the activity may be an infringement, acts expeditiously to remove or disable access to the information." This "notice and takedown" provision closely resembles provisions set out in the U.S. *Digital Millennium Copyright Act* (creating a new section 512(1) (c) in the U.S. *Copyright Act*<sup>11</sup>) and Article 14 of the EC Copyright Directive.<sup>12</sup>

During public consultations on digital copyright issues, organizations representing large Internet Service Providers suggested that the government introduce a "notice and notice" regime in the *Copyright Act* instead of a "notice and takedown" regime. Some of the submissions made by

<sup>10</sup> Society of Composers, Authors and Music Publishers of Canada v. Association of Internet Service Providers, June 30, 2004. The decision is available on-line at:

~~<<http://www.lexum.umontreal.ca/csc-scc/en/en/rec/index.html>>~~

<sup>11</sup> The relevant text of the U.S. *Copyright Act* is available on-line at:

<<http://www.copyright.gov/1201/>>.

<sup>12</sup> The text of the EC Copyright Directive is available on-line at:

<[http://europa.eu.int/eur-lex/pri/en/oj/dat/2001/l\\_167/l\\_16720010622en00100019.pdf](http://europa.eu.int/eur-lex/pri/en/oj/dat/2001/l_167/l_16720010622en00100019.pdf)>.

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these organizations described contractual arrangements with the Canadian Recording Industry Association that incorporate a “notice and notice” approach. They also noted that this “notice and notice” regime serves the purpose of establishing communications between the rights holders and the alleged infringers and that the great majority of cases have been resolved without recourse to law suits. A number of educational and other organizations have dropped their support for a “notice and takedown” regime and now support the “notice and notice” regime recommended by the ISP organizations.

One of the advantages of a “notice and notice” regime in comparison with “notice and takedown” is that it would hold ISPs to no higher standard than already exists in the law with regard to other illegal materials posted on Web sites, including child pornography. This issue of a “horizontal approach” to ISP liability was raised in WIPO document SCCR/8/2, which described the issue as follows:

One threshold question that legislators might deal with at the national level is whether the approach should be specific to copyright, or what has been called a “horizontal approach,” that is, a rule governing the responsibility of service providers irrespective of the grounds for illegality of the transmitted material. In other words, the horizontal approach would cover not only copyright infringement but also other laws such as libel or obscenity (such as in the European Directive on Electronic Commerce).<sup>13</sup>

A horizontal approach would make the obligations on ISPs consistent and avoid many of the problems associated with a “notice and takedown” regime.

In late 2003, Industry Canada published the study *Assessing the Economic Impacts of Copyright Reform on Internet Service Providers*<sup>14</sup> that assessed the following four options for addressing the issue of ISP liability: 1) the status quo, 2) “notice and takedown,” 3) “notice and notice,” and 4) compulsory licensing. In section 4.4.3 of the paper, after suggesting that a “notice and takedown” regime “has the advantage of conforming with an emerging international standard,” the author makes the following statements about the advantages of a “notice and notice” regime:

The primary advantage [of “notice and notice”] over the takedown approach from the perspective of ISPs is not putting ISPs in a “quasi-judicial” role that conflicts with the interests of their clients. Legal and administrative costs may be lower than in the Notice and Takedown approach as well. From the perspective of ISP clients, the Notice and Notice is also preferred as it is perceived as striking a better balance between the rights of ISP clients and rights holders.

In the summary section at the end of the study, the author strongly recommends that the *Copyright Act* be amended to provide explicit limitations of ISP copyright liability under either the “Notice and Notice” or “Notice and Takedown” proposals.

Under a “notice and notice” regime a rights holder should be required to obtain a judicial order before an ISP is required to divulge the name of a subscriber who is alleged to have infringed copyright. The necessity for a court order before such information must be revealed would address some of the concerns of ISPs about the privacy rights of their patrons as well as the

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<sup>13</sup> The text of the WIPO document is available on-line at:  
<[http://www.wipo.int/documents/en/meetings/2002/sccr/index\\_8.htm](http://www.wipo.int/documents/en/meetings/2002/sccr/index_8.htm)>.

<sup>14</sup> The study is available on-line at:  
<[http://strategis.ic.gc.ca/epic/internet/inippd-dppi.nsf/vwGeneratedInterE/h\\_ip01070e.html](http://strategis.ic.gc.ca/epic/internet/inippd-dppi.nsf/vwGeneratedInterE/h_ip01070e.html)>.

possible damage that the voluntary release of information could do to the ongoing relationship between an ISP and its users.

If, after having contacted an alleged infringer, a rights holder is unable to resolve its dispute with an individual, the rights holder could pursue further legal remedies that could include an order from a court requiring an ISP to take further steps such as the removal of an infringing Web page from its server or the termination of Internet services. An example of one possible remedy is the injunction against an ISP that can be issued by a court in the U.K. pursuant to section 27 of the new *Copyright and Related Rights Regulations 2003*<sup>15</sup> that implemented the European Parliament and Council's *Copyright Directive* (Directive 2001/29/EC).

## **(b) Mere Conduit**

### **Recommendation**

**Amend the *Copyright Act* to permit a service provider to make a transient copy of material provided by the recipient of the service in order to transmit, route, or provide network connections, or to provide access to a communications network, without infringing copyright, on condition that the service provider does not:**

- (a) initiate the service;**
- (b) select the receiver of the transmission; or**
- (c) select or modify the information contained in the transmission.**

This exception would permit the automatic, intermediate, and transient storage of the information transmitted. The information could not be stored for a time longer than is reasonably necessary in order to effect the transmission.

The proposed exception is similar in nature to Article 12, the "mere conduit" exception, in the European Union's *Directive on Electronic Commerce*. The purpose of the mere conduit exception is to permit the making of transient copies as part of the technical process of operating an on-line communications system without infringing copyright.

## **(c) Automatic Caching**

### **Recommendation**

**Amend the *Copyright Act* to permit a service provider to make a temporary copy of a work or other subject-matter through an automatic and technical process for the purpose of making more efficient onward transmission to a recipient of a service, at the request of the recipient. The service provider:**

- (a) must not modify the material;**
- (b) must comply with the conditions on access as specified in the material;**
- (c) must comply with common practices regarding the updating of the material, or the updating requirements specified in the material itself;**
- (d) must not interfere with the technology commonly used to obtain data on the use of the material; and**

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<sup>15</sup> The text of the relevant section of the U.K. regulations is available on-line at: <http://www.legislation.hmso.gov.uk/si/si2003/20032498.htm#27>.

- (e) **must act expeditiously to remove or to bar access to the material upon obtaining knowledge of one of the following:**
  - (i) **the material has been removed from the communications network at the initial source of the transmission;**
  - (ii) **access to the material or to the communications network has been denied; or**
  - (iii) **a competent authority has ordered removal or barring of the material.**

A cache is a mechanism for temporarily storing a copy of on-line materials so that, for example, when a person wishes to return to a Web page that has been viewed recently, the person's Internet browser can retrieve a copy of the document from the cache of the person's computer or similar device rather than from the server where the document originated. Common types of cache on a computer are "cache memory," a type of random access memory that can be read more quickly than normal RAM, and a "disk cache," which is usually part of the hard disk of a computer. In addition, the design of networks can create temporary cached copies of works or other subject-matter on their networks, using an automatic and technical process, for the purpose of making such materials available in an efficient manner to the users of their networks. All of these types of cache are of a limited size, so that they are emptied out automatically as new copies enter the cache and replace older cached copies. In addition, caches are usually programmed to delete temporary copies after a fixed period of time (e.g., once a week).

The purpose of the proposed exceptions is, first, to ensure that temporary copies that are made and stored in the cache of a person's computer or similar device do not infringe copyright, and second, to ensure that a service provider can make temporary cached copies on a network, through an automatic and technical process, for use by network patrons without infringing copyright. The Supreme Court of Canada has upheld a Federal Court of Appeal ruling that caching for the purpose of enhancing Internet economy and efficiency does not constitute copyright infringement.<sup>16</sup>

#### **(d) Intentional Caching**

##### **Recommendation**

**Amend the *Copyright Act* to permit a service provider to intentionally store a temporary copy of a publicly available work or other subject-matter for the purpose of making more efficient its onward transmission to a recipient of a service, at the request of the recipient.**

**The service provider:**

- (a) **must not modify the material;**
- (b) **must comply with the conditions on access as specified in the material;**
- (c) **must comply with common practices regarding the updating of the material, or the updating requirements specified in the material itself;**
- (d) **must not interfere with the technology commonly used to obtain data on the use of the material; and**
- (e) **must act expeditiously to remove or to bar access to the material upon obtaining knowledge of one of the following:**

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<sup>16</sup> Society of Composers, Authors and Music Publishers of Canada v. Association of Internet Service Providers, June 30, 2004. The decision is available on-line at:

[http://www.lexum.umontreal.ca/csc-scc/en/pib/2004/vol2/html/2004scr2\\_0427.html](http://www.lexum.umontreal.ca/csc-scc/en/pib/2004/vol2/html/2004scr2_0427.html)

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- (i) the material has been removed from the communications network at the initial source of the transmission;
- (ii) access to the material or to the communications network has been denied; or
- (iii) a competent authority has ordered removal or barring of the material.

**The term “publicly available” should be defined to mean, for the purposes of this exception, a work or other subject-matter that is communicated to the public by telecommunication, with the consent of the copyright owner, without expectation of payment, and without any technological protection measures, such as a password, encryption or similar techniques intended to limit access or distribution, or a continuously visible symbol notifying users that the material cannot be used for educational purposes.**

Intentional caching can be used by many types of service provider, but it is particularly important for service providers whose networks have limited bandwidth, thereby requiring careful management to avoid the creation of network “bottlenecks.” For example, some educational institutions deliberately download and store copies of frequently used materials onto their local and wide area networks. When a student or teacher tries to access materials that have been cached, the system diverts them to the cached copy rather than to the Internet. The purposes of intentional caching by educational institutions include reducing telecommunications costs, increasing access speeds for students and teachers to the stored materials, and providing schools with some control over what students may access using school computers.

The purpose of the intentional caching exception is to permit a service provider to choose when to make a temporary copy of a work on a communications network in order to store it for use by network users without infringing copyright. Intentional caching makes use of the Internet as well as local and wide area networks, more efficient and less expensive.

The use of caching, whether intentional or automatic, confers no benefit to either service providers or to end-users deriving from the content of the cached works themselves. The only benefits derive from technical efficiencies and, with regard to intentional caching, the ability to control access to certain content.

Since the proposed intentional caching exception applies only to material that has been made “publicly available” without expectation of payment for use, the exception does not violate the provision of the Berne Convention prohibiting the introduction of an exception that conflicts with the normal exploitation of the work or unreasonably prejudices the legitimate interests of the author. The recommended exception cannot conflict with an exploitation that does not exist or prejudice the interests of a copyright owner who has already implicitly authorized use on the Internet without restriction.

Both the European Union and the United States have caching exceptions in their laws. In both jurisdictions, a number of obligations must be met by service providers before the caching exception is available. It is recommended that Canadian service providers be subject to similar obligations.

#### **(e) Peer-to-Peer File Sharing**

##### **Recommendation**

**Amend the *Copyright Act* to permit a service provider to transmit a work, without infringing copyright, where the work is made available or downloaded by a recipient of its services, on condition that the service provider does not:**

- (a) initiate the service;**
- (b) select the receiver of the transmission; or**
- (c) select or modify the information contained in the transmission; and**
- (d) the service provider does not have knowledge that the activity of a subscriber is infringing copyright;**
- (e) the service provider, upon receiving an allegation by a rights holder that an activity of a service subscriber who made a work available on its network, or who downloaded such a work using its network services, is alleged to be infringing, acts expeditiously to communicate the allegation of infringement to the subscriber; and**
- (f) the service provider, upon receiving notice of a ruling by a competent authority that the activities of a subscriber who made a work available on its network or who downloaded such a work using its network services are infringing, takes such steps as are required to comply with the order of the competent authority in relation to the subscriber(s).**

A new issue that has increased in importance since the Forum's Discussion Paper was first released is infringement by Internet users through peer-to-peer (P2P) file sharing. Peer-to-peer file sharing on ISP networks involves the use of file-sharing software, such as Napster, KaZaA and Morpheus, to send files from one individual's computer to another person's computer. Although there are many uses of such software that are legal, the trading of infringing copies of music files, and to a lesser extent movie files, has caused concern among rights holders and collectives.

Concerns about P2P file-sharing have gained particular prominence in the United States. The *Digital Millennium Copyright Act*, the legislation that implemented the 1996 World Intellectual Property Organization treaties, does not specifically address P2P file-sharing. In the U.S., the Subcommittee on Courts, the Internet, and Intellectual Property of the House Committee on the Judiciary held hearings in 2002 on the Piracy of Intellectual Property on Peer-to-Peer Networks. As a result of the hearings, the Joint Committee of the Higher Education and Entertainment Communities was formed in December 2002 with the aim of exploring collaborative solutions to the P2P issue. The Joint Committee has established three separate task forces to focus on the areas of (1) campus education policies and practices concerning copyright rights and responsibilities and their implications for P2P file sharing; (2) the use of computer network management technologies to control inappropriate file sharing; and (3) the development of legal, campus-based on-line music subscription services.<sup>17</sup>

In Canada, there is no legislation that directly addresses the P2P issue, and the issue was too new to have been considered in the Consultation Paper on Digital Copyright Issues that was released by Industry Canada and the Department of Canadian Heritage in June 2001. Two recent court cases, however, have dealt with ISPs and music on the Internet.

In March the Federal Court considered a request by the Canadian Recording Industry Association (CRIA) asking the court to issue an order forcing ISPs to reveal the names of individuals that CRIA alleged had placed copies of infringing copies of musical works on their computer hard drives for the purpose of making them available to other individuals using peer-to-peer

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<sup>17</sup> Information on the work of the Joint Committee and its Task Forces can be found on the Educause Web site at <http://www.educause.edu/Peer-to-Peer/868>.

technology and the Internet. In the case *BMG Canada Inc. v. John Doe*, the Federal Court ruled against CRIA, finding that downloading a song for personal use does not amount to infringement.<sup>18</sup> Setting up the facilities that allow copying did not, in the Federal Court's opinion, amount to authorizing infringement. At the time the Forum Discussion Paper was being updated, this case was being appealed.

In a second case, in June 2004, the Supreme Court of Canada made important rulings on ISPs and whether they could be held liable for the public performance of music on the Internet. In the case of the *Society of Composers, Authors and Music Publishers of Canada v. Canadian Association of Internet Providers* (The "Tariff 22" case), the Supreme Court of Canada ruled that Section 2.4(1)(b) of the *Copyright Act* indicates that, in Parliament's view, Internet intermediaries are not "users" at all, at least for purposes of the *Copyright Act*.<sup>19</sup> So long as an Internet intermediary does not itself engage in acts that relate to the content of the communication, but confines itself to providing "a conduit" for information communicated by others, then it will fall within Section 2.4(1)(b). Activities related to providing a conduit for information communicated by others include the act of caching by an ISP.

The Supreme Court concluded that even knowledge by an ISP that its facilities may be employed for infringing purposes does not make the ISP liable for authorizing the infringement if it does not purport to grant to the person committing the infringement a licence or permission to infringe. An intermediary would have to sanction, approve or countenance more than the mere use of equipment that may be used for infringement. Moreover, an ISP is entitled to presume that its facilities will be used in accordance with law. The Court did caution, however, that notice of infringing content and a failure to respond by "taking it down" may in some circumstances lead to a finding of "authorization".

The Copyright Forum's position is based on the premise, as clarified in the Supreme Court case, that an ISP is entitled to assume that its equipment is being used legally and that the activities of an ISP when it acts as a mere conduit for information incur no liability for authorizing infringement. The Forum's recommendation is also premised on the position that an allegation by a rights holder is not a finding of infringement or equivalent to a notice of infringement. It is merely an allegation until dealt with by the courts. A finding of infringement by a court should be required before an ISP can be deemed to have received notice of infringement.

## 4.5 Transient Copies

### Recommendation

**Amend the *Copyright Act* to stipulate that temporary acts of reproduction which are transient or incidental and an integral part of a technological process and whose sole purpose is to enable (a) a transmission in a network between third parties by a service provider or (b) a lawful use of a work or other subject-matter to be made, and which have no independent economic significance do not infringe copyright.**

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<sup>18</sup> 2004 FC 488; available on-line at <http://decisions.fct-cf.gc.ca/fct/2004/2004fc488.shtml>

<sup>19</sup> 2004 SCC 45; available on-line at <http://www.lexum.umontreal.ca/csc-scc/cgi-bin/disp.pl/en/rec/html/2004scc045.wpd.html?query=%22Tariff%22%20AND%20%2222%22&langue=en&selection=&database=en/jug&method=all&retour=/csc-scc/cgi-bin/srch.pl?langue=en~~method=all~~database=en%2Fjug~~query=Tariff+22~~x=12~~y=7>

The proposed exception would permit browsing or simple viewing or playing of a protected work or other subject-matter, or any portion thereof, that is made publicly available without the requirement to obtain the explicit authorization of the copyright owner to reproduce the work.

Making temporary reproductions in the course of browsing a work in a digital format is necessary in order to view it on a computer screen or to listen to the audio portion of the work. The recommended browsing exception would exclude from the scope of the existing reproduction right temporary copies made in the course of browsing. In technical terms, the exception would permit the operation of the technical processes that are integral to digital access and playback.

In its report to the Information Highway Advisory Council, the Copyright Subcommittee of the Council concluded that the act of browsing a work in a digital environment should be considered an act of reproduction and as such should require authorization by the copyright owner. In its final report, the Council supported the notion that copyright owners should be able to determine whether and when browsing should be permitted, and recommended that the *Copyright Act* should be amended to provide clarification of what constitutes “browsing” and what works are “publicly available.”

The proposed amendment is based on the assumption that in making a work or portion of a work or other subject-matter publicly available (in the sense defined in the proposed exception for educational use of the Internet), the copyright owner is giving implicit authorization for browsing. The proposed exception for temporary copying for purposes of browsing simply clarifies the right of the user to browse what the copyright owner has made publicly available without obtaining explicit authorization to reproduce it.

## **5. Adaptation of Existing Provisions to a Digital Context**

This section discusses how certain provisions in the current law need to be changed and updated to reflect digital technologies.

### **5.1 Electronic Publication**

#### **Recommendation**

**Amend the *Copyright Act* to make it clear that “electronic publication” (i.e., the making available to the public of a work in such a way that members of the public may access the work from a place and at a time individually chosen by them) is equivalent to “publication” for the purposes of the *Act*.**

**If amending the definition of publication *per se* is not feasible, then a clause-by-clause review of the *Act* needs to be undertaken to identify all provisions in which the status of a work with respect to its publication is significant and to determine for each of those clauses whether amendment would be appropriate to ensure parallel treatment for works that are not published but “made available.”**

The term “publication” has significant import in the *Copyright Act*. For example, whether or not a work or other subject matter is protected by copyright in Canada is, in certain cases, dependent

on where the work was first published. The term of protection is, in certain cases, dependent on the date of first publication, and certain exceptions apply only to published works.

With the advent of the Internet and the World Wide Web, “electronic publishing” has emerged as an alternative to conventional means of making copies of a work available to the public. For all intents and purposes, works made available to the public via the Internet, the World Wide Web, or similar means of communication are “published” works.

The status of such works under the *Copyright Act*, however, is problematic. For the purposes of the *Act*, the term “publication” is defined to specifically exclude “communication to the public by telecommunication” as a mode of “publication.” As a consequence, works “published” via the Internet, etc. technically remain “unpublished” works unless they are also “published” through conventional means of distributing copies.

Amendments are required to make it clear that communicating a work on the Internet is effectively the same as publishing the work and that, for the purposes of the *Act*, such works have the same status as “published” works.

The notion of electronic publishing is also relevant to fair dealing. If, as it is sometimes argued, fair dealing applies only to published works, it is important to establish whether “electronic publications” are, for the purposes of fair dealing, “published” works. If they are not, and as a result are deemed to fall outside the scope of fair dealing, fair dealing will in practice become an increasingly meaningless concept as more and more works are made available exclusively in a digital mode.

## **5.2 Exceptions for Educational Institutions**

Note: The following recommendations are based on the assumption that the proposed new exception for educational use of the Internet will be included in the revised law. In the event that the new exception is not included, the recommendations that follow for existing exceptions will have to be revisited.

### **(a) Reproduction for Instruction (section 29.4)**

If the proposed new exception for educational use of the Internet is included in the revised law, section 29.4 need not be amended to include a reference to digital use.

### **(b) Performances (section 29.5)**

#### **Recommendation**

**Amend section 29.5 of the *Copyright Act* to add “communication to the public by telecommunication” to the list of permitted activities. The three specific activities to be included are:**

- (a) communication by telecommunication of a live performance of a work to a student at a distance or to a virtual school where there are no “seats”;**

- (b) communication by telecommunication of a sound recording of a work, or of a performer’s performance that is embodied in a sound recording, to a student at a distance or to a virtual school where there are no “seats”; and
- (c) communication by telecommunication of a performance in public of a work or other subject-matter to a student at a distance or to a virtual school where there are no “seats” at the time of its communication to the public by telecommunication.

The existing section 29.5 permits the performance of works in a classroom setting.

An amendment is required to permit the activities allowed under section 29.5 to take place at a distance. If the students in the classroom perform a play, play a sound recording, or turn on the television, the same material should also be accessible to distant students in the same program of instruction. This would require an amendment to the *Copyright Act* to permit the communication of performances on-line for the purposes of education.

**(c) Taping Radio and Television Programs (sections 29.6, 29.7, 29.8, and 29.9)**

**Recommendation**

**Amend sections 29.6 (permitting copying and performance of news and news commentary programs) and 29.7 (permitting copying and performance of other broadcast programs) of the *Copyright Act* to permit students and teachers to replay these programs on-line for students located outside the classroom.**

The *Copyright Act* currently permits the taping of radio and television programs and replaying the tapes, subject to a number of conditions, for educational purposes. The existing sections permit the making and performing of the copy, but not its communication by telecommunication.

The proposed amendment would adapt the radio and television copying and public performance scheme to allow for the communication of copies made under the regime. The amended exceptions would permit, for example, distance education students to receive the same program as students in a face-to-face learning situation. The proposed amendment is intended to make the same exception available in non-face-to-face teaching situations.

The recently passed copyright amendments in Australia extend their educational radio and television copying scheme to include the communication of copies.

**(d) Clarifying the meaning of “under the authority of an educational institution”**

**Recommendation**

**Amend sections 29.4 through 29.7 of the *Copyright Act* to clarify that students are included in the phrase “an educational institution or a person acting under its authority.”**

Some of the educational exceptions in the existing *Copyright Act* permit persons acting under the authority of an educational institution to benefit from the educational exceptions. It should be made absolutely clear that students are included in the phrase “an educational institution or a person acting under its authority.” This could be accomplished by adding the words “including, but not limited to, a student” where appropriate.

### **(e) Literary Collections (section 30)**

If the proposed new exception for educational use of the Internet is included in the revised law, section 30 need not be amended to include a reference to digital use.

## **5.3 Exceptions for Libraries, Archives, and Museums**

### **(a) Management and maintenance of collections (section 30.1)**

#### **Recommendation**

**Amend section 30.1 of the *Copyright Act* to permit the making of a copy in an alternative format when the format of the original is at risk of becoming obsolete or the technology required to use the original is at risk of becoming unavailable.**

The exception that permits a library, archive, or museum to make a copy of a work, under certain circumstances, for the purpose of maintaining or managing its permanent collection includes a provision relating to technological obsolescence.

The provision, however, is problematic in that, as it is written, it would appear to apply only after the format of the original has become obsolete or the technology required to use the original has become unavailable. In order to effectively manage and maintain works in their collections that are in digital formats, libraries, archives, and museums will have to migrate those works to new formats and to new technological environments while the technology that enables them to “access” and “read” the original digital format is still available. Once the technology becomes unavailable, migrating the work may in fact be impossible.

In connection with its recommendation relating to technological protection measures, the Forum identifies the exception under 30.1 as a specific purpose to which sanctions against circumvention would not apply.

Similarly, the Forum identifies the exception under 30.1 as a specific purpose for which the removal or alteration of rights management information would be permitted in cases where the rights management information interferes unreasonably with the exercise of the exception.

The Forum also identifies the exception under section 30.1 as one that cannot be overridden by the terms of a contract.

### **(b) Research and Private Study (section 30.2)**

#### **Recommendation**

**Amend section 30.2 of the *Copyright Act* to remove the restrictions that currently limit the exception to “printed matter” and “reprographic reproduction” so as to permit a library, archive, or museum to make a copy of a legally obtained, digitally encoded original that forms part of its collection, and/or to provide a digital copy to a patron, provided the copy is**

used only for the purpose of research or private study. The exception would apply both in the case of a request made directly to the library, archive, or museum and in the case of a request made through another library, archive, or museum on behalf of one of its patrons.

Extend the applicability of section 30.2 (2) to articles “made available” in on-line periodicals and newspapers in addition to articles “published” in conventional periodicals and newspapers.

Place the following safeguards on the making of a digital copy under the exception in section 30.2:

- (a) all intermediate copies must be destroyed once the transaction is complete;
- (b) the library, archive, or museum must employ reasonable technological protection measures to prevent unauthorized use of the digital copy that is provided to the patron;
- (c) the library, archive, or museum must not circumvent any technological protection measures used by the copyright owner to protect the work, except where a specific limitation to the prohibition against circumvention has been provided for in the *Act*;
- (d) the library, archive, or museum must not remove or alter rights management information accompanying the work except in cases where the rights management information interferes unreasonably with the authorized display or reproduction of the work;
- (e) the library, archive, or museum must warn patrons against infringement of copyright and provide them with ready access to information on the *Copyright Act* and any relevant tariffs, licences, etc.;
- (f) the library, archive, or museum must maintain records on digital copying done under the exceptions in subsections 30.2(2) and 30.2(5), as required by regulation.

The exceptions in section 30.2 of the *Copyright Act* permit a library, archive, or museum (a) to act on behalf of a person engaged in fair dealing and (b) subject to certain restrictions, to make a copy of an article published in a newspaper or periodical for a person requesting to use the copy for research or private study. The exceptions apply to requests made by patrons of other libraries, archives, and museums as well as to those made directly by patrons of the library, archive, or museum answering the request.

- Within a digital environment, the application of this set of exceptions to facilitate research and private study is problematic in a number of respects: the scope of application of the exception in subsection 30.2(1) is dependent on clarification of the applicability of fair dealing in a digital environment;
- the scope of application of the exceptions in subsections 30.2(2) and 30.2(5) is dependent on whether a work made available originally or exclusively via the Internet, World Wide Web or similar means of communication is considered to have been “published”; and,
- elements of the present exception are circumscribed by language that deals only with printed matter and reprographic reproduction.

The need for clarification of fair dealing and the uncertainty surrounding “publication” in a digital environment are discussed in the section “Electronic Publication.” Section 30.2 of the *Act* must be clarified in relation to both of those issues.

In addition, subsections 30.2(2) and 30.2(5) require revision so as not to prevent a library, archive, or museum from using digital technology to achieve efficiencies in support of research and private study. In recognition of the fact that the use of digital technology introduces new

risks of diminished control over the work for the rights holder, appropriate safeguards should be built into the exceptions to ensure that their application continues to be linked to private study or research use.

In connection with its decision on a recommendation relating to technological protection measures, the Forum identifies the exceptions under 30.2 as specific purposes to which sanctions against circumvention would not apply.

Similarly, the Forum identifies the exceptions under 30.2 as specific purposes for which the removal or alteration of rights-management information would be permitted in cases where the rights management information interferes unreasonably with the exercise of the exceptions.

The Forum also identifies the exceptions under section 30.2 as exceptions that cannot be overridden by the terms of a contract.

## **5.4 Institutional Exemption from Liability (section 30.3)**

### **Recommendation**

**Amend section 30.3 of the *Copyright Act* to exempt an educational institution, library, archive, or museum from liability for infringement of copyright where:**

- (a) a copy of a work or other subject-matter is made using a computer or similar device;**
- (b) the computer or similar device is installed by or with the approval of the educational institution, library, archive, or museum on its premises for use by students, instructors, or staff at the educational institution, or by persons using the library, archive, or museum; and**
- (c) the educational institution, library, archive, or museum makes reasonable efforts to inform students, instructors, staff, and patrons about copyright law and warn against copyright infringement.**

Section 30.3 of the *Copyright Act* provides educational institutions, libraries, archives, and museums with an exemption from liability, under certain conditions, for any infringements committed by persons using self-serve photocopiers in their institutions. This exemption applies only to reprographic reproduction. A new technologically neutral exemption is required to cover the use of computers and similar devices furnished by institutions for students, staff, teachers, and patrons.

The Australian *Copyright Act* (section 104B) includes a provision stipulating that if an infringing copy of either a published edition of a work or a sound recording is made on a machine (including a computer) in a library, and a warning notice was posted in close proximity to the machine, the library cannot be deemed to have authorized the making of the copy merely because the copy was made on the library's machine. The Australian example supports the recommendation on institutional exemption from liability.<sup>20</sup>

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<sup>20</sup> The text of the relevant section of the Australian *Copyright Act* is available on-line at [http://www.austlii.edu.au/au/legis/cth/consol\\_act/ca1968133/s104b.html](http://www.austlii.edu.au/au/legis/cth/consol_act/ca1968133/s104b.html).

## 6. Other Issues

### 6.1 Term of Protection

#### Recommendation

**Maintain the existing term of copyright protection of the life of the author plus 50 years.**

**Amend the *Copyright Act* in order to treat Crown works the same as other works as far as term of protection is concerned.**

Both the European Union and the United States have recently extended the term of copyright to life of the author plus 70 years. Under the terms of the international treaties it has signed, Canada is not obliged to follow suit, but the political realities of a global economy and the proximity of the United States make it likely that Canada will be under heavy international pressure to extend its term of protection.

The Copyright Forum opposes such an extension of term. The Forum strongly believes that effective public policy must maintain a balance between a robust public domain and appropriate protections for the rights of copyright owners.

Under the current *Copyright Act*, any work that is prepared or published by or for the Crown is protected until it is published and for an additional 50 years after publication. The result is that Crown works that remain unpublished are protected by copyright indefinitely. In Phase II of the revision process, a similar provision for non-Crown unpublished works was replaced by a new provision that gives the same term of protection whether a work is published or not. Unpublished works protected by Crown copyright are the only works that remain protected by copyright indefinitely. The Copyright Forum believes that there is no valid reason to justify such a difference.

### 6.2 Crown Copyright

#### Recommendation

**Amend the *Copyright Act* to place legislative material and court decisions in the public domain.**

**Retain copyright protection on all other types of government documents until a more in-depth analysis of the issue of Crown copyright within a digital environment has been completed.**

Under section 12 of the *Copyright Act*, the Crown holds copyright for any work prepared or published by or for any federal or provincial government organization.

The question of whether Crown copyright should continue to exist in Canada is an issue that has been the object of numerous discussions, studies, and reports mainly because in the United States there is no copyright in government works, since all material produced by the U.S. government is in the public domain as it is created. The U.S. approach is based on the notion that taxpayers have paid for the creation of government works and should therefore not be required to ask

permission to use those works. But the Commonwealth tradition has always considered Crown copyright to be an important prerogative and favours the retention of Crown copyright. In 1997, through an Order-in-Council, the federal government made an exception to the Crown copyright principle by allowing federal laws and federal court and tribunal decisions to be reproduced without requesting permission.

Access to government information is one the pillars of a democratic society and it is obvious that digital technology — and more specifically the Internet — should enable all Canadians to have better access to basic democratic material such as the law of the land and the court decisions affecting their daily life. While there is not yet a consensus on the future existence of Crown copyright in Canada, the Copyright Forum strongly believes that a statutory exception should be made at least for all legislative material, including parliamentary material such as debates and committee proceedings and reports.

Governments are among the most important providers of information, sometimes on a statutory basis and at other times because of their moral obligation as the guardian of democratic values. While there is general agreement that government information should be made available as easily as possible and at a minimal cost, it is important as well that it be controlled in order to avoid inappropriate use, such as abusive commercial use. Since Crown copyright is among the tools available to exercise such control, it cannot simply be abolished without a thorough study of the issue.

The United Kingdom has an access policy applicable to government information. The basic policy principles are two-fold: first, to maintain the integrity and status of works produced within the government by stating that Crown copyright will continue to exist; and second, to encourage the widest possible dissemination of and access to government content. Significantly, the policy treats Crown works differently depending on whether or not they have been published. The U.K. government waives its copyright in public records that are available to the public and that were unpublished when they were transferred to the national public records office (in England, Scotland, Wales, or Northern Ireland). The Canadian archival community and the researchers they serve would welcome a similar approach.

More and more government information, including specialized reports and studies, is now made available exclusively on the Internet through departmental Web sites. As well, growing numbers of Canadians now have access to the Internet as a result of the implementation of government policies aimed at facilitating public use of the Internet. Within such a context, there is an urgent need to clarify the status of Crown copyright in order to avoid a conflicting situation where citizens would be legally denied the right to reproduce and/or use material that is being made available to them as part of national public policy.

### **6.3 Rights Management Information**

#### **Recommendation**

**Legal restrictions on the removal or alteration of rights management information should apply only where the term of copyright protection of the attached work or other subject-matter is still in force.**

**The removal or alteration of rights management information should be permissible where such information interferes unreasonably with the authorized display or reproduction of a copyright work or other subject-matter.**

**An exception should be made to address cases where rights management information is used as a mechanism for infringing the privacy rights of the user.**

**Any provision for the protection of rights management information added to the *Copyright Act* should be explicit about what is encompassed within the meaning of the term “rights management information.”**

**The *Act* should make it clear that the information is to be understood only as an assertion made by a rights owner, which may or may not be legally binding in Canada.**

**The *Act* should provide penalties against a rights owner responsible for making false or misleading statements.**

**With respect to persons other than rights owners and their appointed agents, the *Act* should provide sanctions only against those who alter rights management information in such a way as to deliberately make it false or misleading, and not against those who alter rights management information simply to correct an inaccuracy.**

The WIPO *Copyright Treaty* and the WIPO *Performance and Phonograms Treaty* both contain provisions requiring that member states enact remedies against the removal or alteration of “rights management information” attached to works or other subject-matter, and against the distribution of works or other subject-matter in the knowledge that such information has been removed or altered. “Rights management information” is broadly defined in the WIPO treaties to mean information attached to a work or other subject-matter that identifies the work or other subject-matter, author, performer, performance, producer of a sound recording, copyright owner, or any information regarding the terms and conditions for use or the work or other subject-matter.

The discussion papers commissioned by the federal government in relation to the WIPO treaties recommended a new section in the *Copyright Act* to deal with rights management information.

Canadian law needs to be very clear on what constitutes “rights management information” for the purposes of the *Act*, and standards need to be established for the presentation of such information.

Any new provision of this nature in Canadian law must be drafted carefully so as to avoid hindering legitimate activities. For example, when the term of copyright protection for a work has expired, it should be permissible to remove rights management information attached to the work.

In the focus paper issued during the consultations on digital copyright issues in 2002, departmental officials pointed out that the terms and conditions set out in rights management information may not be legally binding in Canada, and that protecting such information should not be construed as confirming the legal validity of those terms and conditions. Departmental officials also raised a number of specific questions about the appropriate level of protection and remedies.

As additional background, it should be noted that the United Kingdom’s *Copyright and Related Rights Regulations 2003* narrow the WIPO definition of rights management information by

limiting it to information provided by the copyright owner or the holder of any right under copyright. It should be noted further that the provisions of the U.K. regulations apply only to electronic rights management information.<sup>21</sup>

## 6.4 Database Protection

### Recommendation

**If the Government decides to enact legislation to strengthen the legal protection of databases, the increased protection should be achieved through minor amendments to the *Copyright Act* that will maintain an appropriate balance in our copyright laws and ensure that fair dealing and copyright law exceptions will continue to apply to databases.**

There is some uncertainty in Canadian law regarding the extent to which the *Copyright Act* protects “sweat of the brow” databases. In limited cases, these databases may require extensive time, labour, and expense to compile but may not pass the minimal threshold test of “originality” to qualify for copyright protection. As a result, certain members of the database industry have expressed concerns about the vulnerability of digital databases to unfair commercial copying and asked the government to enact additional legal protections for databases, including possible new forms of intellectual property protection for databases. Legitimate concerns about unfair commercial copying, however, should not lead to the introduction of a new *sui generis* database protection law that may go beyond the curtailment of industrial piracy and threaten public access to facts and public domain works.

If the government seeks to strengthen the protection of databases, it should do so through minor amendments to the *Copyright Act* that will maintain balance in our laws while addressing reasonable concerns about unfair commercial competition.

Careful consideration needs to be given to the scope of protection that is provided to databases to ensure that users have reasonable access to the content of a database. Caution also needs to be exercised to ensure that the protection provided does not have the effect of giving the producer of the database exclusive control over the intellectual content of the database for a protracted period of time.

## 6.5 Fair Dealing for the Purposes of Teaching

### Recommendation

**Amend section 29 of the *Copyright Act* to state that fair dealing for the purpose of teaching (including multiple copies for instructional use) does not infringe copyright.**

Section B.2.8 of *Supporting Culture and Innovation: Report on the Provisions and Operation of the Copyright Act* (the “Section 92 report”) asks “whether sections 29 and 29.1 of the *Copyright Act* should be amended to expand the scope of fair dealing to ensure that it does not exclude activities that are socially beneficial and that cause little prejudice to rights holders’ ability to exploit their works or other subject matter.” This question may provide an opening for the

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<sup>21</sup> The text of the relevant section of the U.K. regulations is available on-line at: <http://www.legislation.hmso.gov.uk/si/si2003/20032498.htm#25>.

Copyright Forum to seek an amendment to the fair dealing provision to add “teaching” to the permitted purposes set out in section 29 of the *Copyright Act*.

The fair use provision in section 107 of the United States *Copyright Act*<sup>22</sup> provides that fair use for the purpose of teaching (including multiple copies for instructional use) does not infringe copyright. The effect of this provision is that teachers can use portions of various types of works, including works available through the Internet, for the purpose of teaching. U.S. educational institutions can and do use this provision in many ways. One example is the use of portions of digital works in course Web sites.<sup>23</sup>

Fair dealing in Canadian law allows the use of works for private study and other purposes, but not for teaching. This leaves Canadian educators at a disadvantage in comparison with their counterparts in the United States. Amending the fair dealing provision to allow the making of multiple copies for instructional use would facilitate the use of technology-enhanced learning, including distance education, and help to put Canadian educational institutions on a more equal footing with U.S. educational institutions.

## 6.6 Performances of Films and Videos

### Recommendation

**Amend Section 29.5 of the *Copyright Act* to permit:**

- (1) the performance of an audio-visual work on the premises of an educational institution; and**
- (2) an educational institution or a person acting under its authority to make an ephemeral digital copy of a performance permitted by section 29.5 and communicate the copy by telecommunication to students enrolled in a course of instruction. The ephemeral digital copy could be made available for a limited period of time.**

Section 29.5 of the Canadian *Copyright Act*, which provides an exception for certain types of performances done “on the premises of educational institutions,” does not extend to films and videos. Many educational organizations have argued that this anomaly should be corrected.

In comparison, s.110 of the U.S. *Act* permits the performance of a motion picture or other audiovisual work by instructors or pupils in the course of face-to-face teaching activities of a non-profit educational institution.<sup>24</sup>

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<sup>22</sup> The text of the relevant section of the U.S. *Copyright Act* is available on-line at:  
<<http://www4.law.cornell.edu/uscode/17/107.html>>.

<sup>23</sup> For informational materials on the use of the fair use provision in education, see the University of Texas Web site at:

<<http://www.utsystem.edu/OGC/IntellectualProperty/copypol2.htm#rules>>;

the University of Georgia system Web site at:

<<http://www.usg.edu/admin/legal/copyright/#part2b2>>;

and a discussion of the relationship between the TEACH Act and fair use at:

<<http://www.utsystem.edu/ogc/intellectualproperty/teachact.htm>>.

<sup>24</sup> The text of the relevant section of the U.S. *Copyright Act* is available on-line at:  
<<http://www4.law.cornell.edu/uscode/17/110.html>>.

In November 2002, the U.S. government passed the *Technology, Education and Copyright Harmonization (TEACH) Act*. This *Act* permits the electronic transmission of a performance described in section 110 of the *Act*. The full classroom display of a work can be transmitted electronically with the exception that only a reasonable portion of an audiovisual work may be transmitted electronically. In some circumstances, a work can even be digitized by an educational institution to permit its electronic transmission. There is a restriction in the *Act* on the use of works that are created or marketed primarily for the educational market.<sup>25</sup>

Industry Canada published a report that examines technology-enhanced learning.<sup>26</sup> The report makes a number of favourable comments about expanding current exceptions, extending exceptions to permit digital uses, and enacting a new exception permitting educational use of the Internet. It is recommended reading for Forum members, as is the Industry Canada report on ISP liability.

One part of the Industry Canada report on technology-enhanced learning considers the positive impact of expanding section 29.5 of the *Copyright Act* to include the showing of films and videos by non-profit educational institutions. The author of the study **states**:

Introducing an exception into the *Act* would allow instructors that have been subject to budgetary constraints to use more film and video material in their courses... . Institutions have been discouraged from using films and videos in televised and on-line distance education courses because of the costs along, in some cases, with the difficulties of clearing the required rights. The proposed reform would eliminate the social loss that has resulted because current policies have created a disincentive for the use of films and videos in some situations where they can be a significant aid to learning... . A reform that provided an exception for the showing of films and videos by educational institutions, however, would yield some notable savings in the payments by Canadians to foreigners... .

**Comment [jls1]:** Need exact page of this excerpt to double-check the wording and the nature of the cuts.

## 6.7 Statutory Damages

### Recommendation

**Amend the *Copyright Act* to provide that libraries, archives, museums, and non-profit educational institutions not be subject to statutory damages whether or not they are licensed by a collective or are operating under a tariff certified by the Copyright Board.**

Under the existing copyright law, libraries, archives, museums, and educational institutions cannot be required to pay statutory damages if they have a licence with a collective society authorizing reprographic reproduction (photocopying). If they do not have a licence, then statutory damages can be awarded against them. The statutory damage provisions in the *Copyright Act* allow a copyright owner to claim an amount between \$500 and \$20,000 in respect of each work, sound recording, performance, or communication signal that is infringed.

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<sup>25</sup> For an overview of the TEACH Act, see the “TEACH Toolkit” available on-line at: <http://www.lib.ncsu.edu/scc/legislative/teachkit/overview.html>.

<sup>26</sup> The report is available on-line at: [http://strategis.ic.gc.ca/epic/internet/inippp-dppi.nsf/en/h\\_ip01074e.html](http://strategis.ic.gc.ca/epic/internet/inippp-dppi.nsf/en/h_ip01074e.html).

In accordance with section 38.1(6)(b), statutory damages cannot be awarded against a library, archive, museum, or educational institution that is sued by a copyright owner who has not authorized a collective to license reproduction. However, a library, archive, museum, or educational institution is subject to statutory damages if it is sued by a copyright owner who has authorized a collective to license reprographic reproduction (section 38.2). While section 38.1(6)(b) is cast broadly, section 38.2 makes specific reference to reprographic reproduction.

Particularly in the case of reprographic reproduction, these sections have led to negative consequences for libraries, archives, museums, and educational institutions, in that they effectively push them into collective licensing, which provides immunity from all damages including statutory damages. The practical result could be that transactional licensing with anyone other than a collective is eliminated as an alternative to collective licensing, even in situations where transactional licensing is a more viable choice for a library, archive, museum, or educational institution. Without an exception for libraries, archives, museums, and educational institutions, collectives will continue to be in a strong bargaining position because they are, in effect, licensing immunity from statutory damages as well as providing copyright authorization. Amending sections 38.1 and 38.2 so that libraries, archives, museums, and educational institutions are not subject to statutory damage claims whether or not they are licensed by a collective would provide a necessary balance in bargaining positions between collectives and users.

## **6.8 Record-Keeping**

### **Recommendation**

**Amend the regulations to delete the requirement to keep records of copying pursuant to sections 30.2 and 30.21 of the *Copyright Act*.**

Regulations provide that a library, or a person acting under the authority of one, must keep records when a copy is made under the exception in section 30.2 of the *Copyright Act*. Archives are also required to keep records when a copy is made under the exception in section 30.21 of the *Act* permitting the copying of archival records deposited before September 1, 1999, for research and private study. The requirement to keep records for copies made for a patron under fair dealing ended on December 31, 2003. All the other record-keeping obligations continue until the regulations are repealed.

Keeping the required records is an administrative burden imposed on libraries, archives, and museums. As far as Copyright Forum members are aware, there has been no request made to examine any of the required records since their enactment in 1999 until January 2004. In December 2003, Industry Canada conducted a survey of libraries to determine whether rights holders were using the records required to be kept under the regulations. The results of the survey were that no requests for photocopying records had been made between September 1, 1999, and December 31, 2003. On January 9, 2004, Access Copyright requested photocopying records going back to September 1999 relating to approximately 94,000 titles from twenty-three libraries across the country.

Libraries dealing with this issue have taken the position that the regulations were not intended to provide rights holders with a mechanism to make broad-based general inquiries unrelated to any particular case of suspected infringement. The request sent by Access Copyright is considered not to be in keeping with the intent of the regulations because it asks libraries to relate over six

years of copying records with 94,000 items listed on a CD. It is impossible that there are 94,000 cases of suspected infringement.

## 6.9 Linking

### Recommendation

**Amend the *Copyright Act* to provide that linking is not an infringement of copyright regardless of whether the linked Web site contains infringing material.**

Linking is a new issue that has arisen as a result of the ministerial report on the Section 92 review, *Supporting Culture and Innovation: Report on the Provisions and Operation of the Copyright Act*. The Section 92 report describes linking as “the use of a hypertext link by which a Web site and its content are made directly accessible from another site that the user is “browsing.” Typically, the user reaches the new site by clicking on underlined text or an icon that represents the link” (page 16). The *Digital Millennium Copyright Act* in the United States refers to linking as “information location tools.” (section 12D). The European Council’s *Copyright Directive* does not refer to linking.

Linking is a fundamental activity on the Internet. However, linking to a Web site does not constitute endorsement of the information on the linked Web site or even knowledge of the source of the material. Linking to a specific page or place on a Web site should not create a legal responsibility for material on that Web site. Even if the copyright status of the material on a linked site could be verified at the time the link is created, Web sites are constantly changing. Material is added and removed. It is therefore impossible in any practical way to ensure that the linked material remains non-infringing over time. Linking is no more than a method of directing Internet users to information. If a Web site creator wishes that users not be directed to the Web site then it is simple matter of putting up a gate to prevent directions to the Web site being given.

Negative consequences are likely to occur if linking is considered an infringement of copyright. The law could be ignored or the links not used. A law that makes common behaviour illegal is undesirable. It would also place an impossible burden on the average citizen to decide what is infringing and what is not. In the case of educational institutions, the more likely consequence is their ceasing to use links. The effect would be a less productive use of the Internet and a consequent reduction of the ability to develop student skills.