

EDUCATION ISSUES IN BILL C-61

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1. INTRODUCTION

The Canadian Teachers' Federation (CTF) is part of a broad consensus within Canada's education community in favour of an amendment on the educational use of the Internet, similar to the one found in Bill C-61, *An Act to Amend the Copyright Act*, tabled in the House of Commons on June 12, 2008. The Bill assures Canadian teachers and students that during their routine teaching and learning activities, they can use material made publicly available on the Internet without breaking the law.

However, as a result of the Coalition's review of the details of the Bill, CTF will be supporting a number of amendments to clarify and adjust some disturbing components, particularly in the "Technological Measures Section". This section gives rights holders a new legal protection that has nothing to do with copyright protection for creative content. If passed as is, it would mean that educational institutions, teachers and students would lose their rights under fair dealing, educational and library exceptions, or other user's rights in copyright law to copy, perform or share electronically a digital work that has been locked by a "technological measure".

In addition to the above, CTF is interested in adding statements that clarify that the enactment of specific user rights, such as the education amendment, does not narrow the concept of fair dealing.

2. EDUCATION ISSUES IN BILL C-61

Bill C-61 is long and complex. Many of its provisions, if enacted, will impact the delivery of education to Canadians. Although all of the topics listed below will have an impact on the education of Canadian students, the most significant by far is the amendment in Bill C-61 providing for a new users' right to educational use of publicly available Internet material. Since this amendment is the most important from an educational perspective, it is addressed first. Seven additional matters in Bill C-61 are of concern to CTF: (i) technology- enhanced learning, (ii) technological measures, (iii) circumvention services and devices, (iv) the perceptually disabled, (v) rights management information, (vi) Internet service provider (ISP) liability, and (vii) remedies available to rights holders for incorrectly asserting a users' right to fair dealing.

3. EDUCATIONAL USE OF THE INTERNET

3.1 *Bill C-61*

Reference: pages 23 and 24 of Bill C-61, Clause 18, creating a new section 30.04 in the *Copyright Act*.

3.2 *Legislative Intent*

The educational use of the Internet amendment in Bill C-61 permits educational institutions, teachers, and students to use publicly available Internet materials. The amendment permits routine classroom activities such as incorporating text or images in homework assignments, performing music or plays on-line for their peers, exchanging materials with teachers or peers, or re-posting a work on a restricted-access course Web site. To encourage copyright awareness and respect in all circumstances, students and educators would be required to cite the source of the Internet materials that they use.

The amendment applies strictly to the use of **publicly available materials** on the Internet. Publicly available materials are those posted on-line by content creators and copyright owners without any technological protection measures, such as a password, encryption system, or similar technologies intended to limit access or distribution, and without a clearly visible notice prohibiting educational use. These publicly available materials, intended to be widely accessed and shared, may include text, images, music recordings, audiovisual works, theatrical performances, or instructional demonstrations. The proposed education amendment will ensure that it is legal for students and educators to reasonably access and use publicly available Internet materials.

The proposed amendment will not exempt institutions from paying for digital materials such as purchasable CD-ROMS, subscription databases, licensed software, on-line courses, and other curriculum resources. Copyright owners who wish to sell or otherwise limit access and distribution of their digital or on-line materials can continue to do so through subscription, password, and payment technologies. The proposed education amendment will have no application to materials that are not freely accessible. This therefore allows content creators and copyright owners to continue selling and receiving payment for their works, as they intended.

3.3 Why the Educational Use of the Internet Amendment Is Necessary

Copyright infringement is of key concern to teachers across the country. Generally, the education sector believes that every student and teacher must be assured of timely and reasonable access to Internet materials. To this end, the CTF, together with many other national educational organizations — the Association of Canadian Community Colleges, the Council of Ministers of Education (CMEC), the Canadian School Boards Association, and the Canadian Home and School Federation (CHSF) to name some of them — strongly support Parliamentary passage of the educational use of the Internet amendment in Bill C-61.

Rapid advances in technology-enhanced learning call for a modern *Copyright Act* that serves the public interest by permitting reasonable access to, and use of, Internet materials for purposes such as education, teaching, research and innovation, and the dissemination of knowledge.

The proposed educational use of the Internet amendment provides clarity in the copyright law. Parliamentary passage of this amendment will avoid litigation to determine how fair dealing and an implied licence may apply to educational uses of Internet materials.

The amendment is also necessary because during the 2002 consultation facilitated by the Department of Canadian Heritage and Industry Canada, some rights holders and collectives took the position that fair dealing and the implied licence theory do not apply to the educational uses of their works.

Finally, the cautionary comments of the Supreme Court of Canada in the CCH decision relating to the distribution of multiple copies of works make the educational use of the Internet amendment necessary.¹

3.4 Relating Fair Dealing and Specific User Rights

The CTF believes that enacting a specific statutory exception like the educational use of the Internet amendment would not narrow fair dealing for those outside the education community. The Supreme Court in the 2004 Law Society case directed that a fair dealing analysis be conducted first, and only if the use did not fall within fair dealing, should a further analysis be conducted to see whether the use could fall within a specific user right. Despite this direction from the Supreme Court, there are some who believe that the enactment of specific user rights does narrow fair dealing.

¹ CCH Canadian Ltd. v. Law Society of Upper Canada, 2004 SCC 13, paragraphs 55, 67 and 68.

To make it clear that enacting a specific statutory exception (like the educational use of the Internet amendment) would not narrow fair dealing, It is recommended that the Act state that specific exceptions do not narrow fair dealing. This amendment could be inserted in the part of the Act headed “Exceptions” immediately following the fair dealing provisions themselves and provide that “Nothing in sections 29.4 through 32.2 of this Act is intended to limit or otherwise alter the scope of fair dealing”.

3.5 The Knowledge Requirement

While the CTF fully supports the passage of the proposed educational use of the Internet amendment, it believes that one amendment to the wording of section 30.04 is necessary.

Bill C-61 provides that the proposed educational use of the Internet amendment does not apply if the educational institution, or a person under its authority such as a student or teacher, “knows or should have known that the material was made available through the Internet without the consent of the copyright owner.”²

We agree with the policy intent of this condition. However, the standard of knowledge in subsection 30.04(5), “knows or should have known”, is different from the standard of knowledge set out in other sections of the Bill C-61 and in the existing Act. For example:

-subsection 38.14(2)³ [page 30 of Bill C-61] and subsection 48.18⁴ [page 38 of Bill C-61] specify a standard of knowledge requiring that “the defendant was not aware and had no reasonable grounds to believe.”

-subsection 41(1)(a) of the current *Copyright Act* specifies a standard of knowledge that requires that the “plaintiff knew or could reasonably have been expected to know”.

The difference between these standards is unclear. There is a need for consistency in the wording of knowledge standards in the *Copyright Act*. The rule of statutory interpretation known as the “presumption of consistent expression” would be applied by a court interpreting the *Copyright Act*. This presumption holds that, where a different form of expression is used in a statute, it is presumed that a different meaning must have been intended by the legislature:

² Clause 18, section 30.04(5).

³ Clause 30, section 38.14(2).

⁴ Clause 31, section 48.18.

It is presumed that the legislature uses language carefully and consistently so that within a statute or other legislative instrument the same words have the same meaning and different words have different meanings.⁵

The knowledge standard is significant. In 2001, education organizations identified potential copyright infringement problems arising from the posting of some materials to the Internet without the knowledge or consent of the copyright owner. Their original proposal to address these problems suggested that if educational users actually knew that publicly available Internet materials were posted without consent of the owner, they could not use them for educational purposes. As noted in the final report of the Working Group⁶ convened by the federal government on this issue, educators acknowledged that this standard may represent too high a threshold. As a result, educators modified their original proposal to a threshold of “reasonable grounds to suspect” that materials were posted without consent.

3.6 Amendments

It is recommended that for consistency with the wording of the current *Copyright Act*, section 30.04(5) be amended to provide:

(5) Subsection (1) does not apply if the educational institution or a person acting under its authority knew or could reasonably have been expected to know that the work or other subject matter was made available through the Internet without the consent of the copyright owner.

It is recommended that the relationship between fair dealing and specific user rights be clarified by amending the Act to provide:

Nothing in sections 29.4 through 32.2 of this Act is intended to limit or otherwise alter the scope of fair dealing.

The CTF, together with other national education organizations representing seven million Canadians – from teachers to school boards, parent groups to educational institutions – urges Parliament to adopt this amendment to section 30.04(5).

⁵ Driedger on the Construction of Statutes, Third Edition, by Ruth Sullivan, Butterworths, 1994, at page 163.

⁶ December 2002, page 17.

4. TECHNOLOGY-ENHANCED LEARNING

4.1 *Bill C-61*

Reference: pages 16 and 17 of Bill C-61, Clause 18, creating a new section 30.01 in the *Copyright Act*.

4.2 *Legislative Intent*

These provisions intend to put students who are receiving instruction “on-line” in a similar position as students receiving instruction in a “face-to-face” teaching situation. This is accomplished by extending classroom activities permitted by the exceptions in sections 29.4 to 29.6 and 29.7(3) to the same activities that take place on-line.⁷

Although the CTF supports this concept, we believe two amendments are necessary to achieve the intended purpose. First, the requirement to destroy on-line lessons does not reflect the way on-line learning is re-used by teachers and educational institutions over time in successive courses. Second, the Bill does not realistically reflect the way on-line learning is delivered to Canadian students.

4.3 *Destroying Lessons*

Subsection 30.01(5)(a) requires any recording of an on-line lesson to be destroyed within 30 days after the students who are enrolled in the course receive their evaluations. The CTF believes that this condition should be deleted. On-line courses are re-used. Destroying them is an unnecessary waste of resources. Under this condition recording of “lessons” would have to be destroyed, requiring the teacher to re-create them for the next semester or term. Section 30.01(5) should be amended to delete the requirement that any recording of an on-line lesson be destroyed within 30 days after the students who are enrolled in the course receive their evaluations.

⁷ For reference, the exceptions in sections 29.4 to 29.6 and 29.7(3) are section 29.4 on reproduction for instruction, section 29.5 on live performances, playing radios and TVs in the classroom, section 29.6 on recording and showing news and news commentary programs, and section 29.7(3) on recording and showing documentaries, if royalties are paid.

4.4 Amendment

The CTF together with other national education organizations representing seven million Canadians – from teachers to school boards, parent groups to educational institutions – recommends that Clause 18, section 30.01(5)(a) be deleted.

4.5 Reproducing Lessons

Subsection 30.01(5)(c) requires that educational institutions take measures to prevent students from fixing and reproducing on-line lessons. This requirement is inconsistent with current practice. The common practice of on-line students is to download their on-line course materials – “lessons” in C-61 parlance – to a portable device (e.g. an MP3 player or lap top computer) so that the lesson can be reviewed while they are away from an Internet connection. A common example is reviewing a “lesson” on the bus.

Retaining this prohibition against the fixing or reproduction of a lesson by a student is not only inconsistent with current use of technology, it is also inconsistent with the federal government’s stated objective of bringing the *Copyright Act* “in line with advances in technology.”⁸ The Preamble to Bill C-61 reiterates the government’s view of revising the Act to reflect the use of digital technology: “And whereas Canada’s ability to participate in a knowledge economy is driven by innovation and network connectivity is fostered by encouraging the use of digital technologies for research and education.” To meet these objectives requires amending subsection 30.01(5)(c) to permit students to download their “lessons” to portable devices so that they may review their on-line lessons while they are away from an Internet connection.

4.6 Amendment

It is recommended that section 30.01(5) be amended as follows:

*30.01(5) The educational institution and any person acting under its authority, except a student, shall
(c) take, in relation to communication by telecommunication of the lesson in digital form, measures that can reasonably be expected to prevent students from communicating it other than as they may do under this section: and*

The CTF, together with other national education organizations representing seven million Canadians – from teachers to school boards, parent groups to

⁸ Reforming the *Copyright Act*. Background, page 1, distributed to stakeholders June 12, 2008.

educational institutions – urges Parliament to adopt this amendment to section 30.01(5).

5. TECHNOLOGICAL MEASURES (TM)

5.1 *Bill C-61*

Reference: pages 31 to 39 of Bill C-61, Clause 31.

5.2 *Legislative Intent*

Clause 31 is aptly described as containing the new “digital locks” sections. Rather than one amendment, there is a series of amendments that together establish an entire complex regime related to TMs. This regime, as it relates to educational institutions and the people who work and learn in them, is summarized below.

Generally, educational institutions, (teachers and students) are prohibited from circumventing TMs (e.g., passwords, time-limited trial systems) that protect copyright material. They cannot provide, market, or import devices or provide services to enable circumvention of TMs. Clause 31, section 41 defines two types of TMs: those **controlling access** and those **controlling use**. When the rights holder employs an access control TM, circumvention by a user is absolutely prohibited, even if the circumvention is for the purpose of doing something that the user has a right to do under the *Copyright Act*. But, circumvention of a use control TM is allowed if the act is permitted under an exception in the *Copyright Act*. For example, a student or teacher may not circumvent an access control TM to make a copy under fair dealing, but they can circumvent a use control TM to make a copy for the same purpose.

The prohibition against circumventing TMs is subject to limitations and exceptions that include reverse engineering, security testing, and encryption research. Persons with perceptual disabilities can circumvent in order to access and use copyright material, e.g. making a Braille version of a work protected by a TM. Consumers can circumvent to protect their personal information.

Bill C-61 provides the government with a regulation-making power that can be used to permit circumvention where the public interest might be served. For

example, regulations can be enacted to permit circumvention if criticism, review, news reporting, teaching, scholarship, or research is adversely affected.⁹

A court may only award an injunction against a library, archive, museum or educational institution if they can satisfy a court that they were not aware, and had no reasonable grounds to believe, that their actions constituted a circumvention of a TM.¹⁰

Bill C-61 also prohibits the manufacture, provision, offering for sale or rental and distribution of circumvention tools.

5.3 *Circumvention for non-infringing purposes should be permitted.*

The *Copyright Act* provides a number of users' rights that permit use of copyright material for specific purposes. There are many examples of users' rights for educational use: fair dealing for research, private study, criticism and review, in section 29, 29.1 and 29.2, reproduction for instruction in section 29.4, performances in section 29.5, reproduction and public performances of news and news commentary in section 29.6 and reproduction of broadcasts in section 29.7. Enacting laws prohibiting circumvention, or possession of devices for the purposes of circumvention, would prevent users from exercising rights given to them under the *Copyright Act* by successive Parliaments over many decades. The CTF recommends that Bill C-61 be amended to provide that circumvention of technological measures is prohibited only when the circumvention is for the purpose of infringing copyright. There are several reasons for this position.

(i) Copyright should protect creative works not technology.

The current copyright law provides a delicate balance between rights of users and copyright owners. If enacted, the provisions in Bill C-61 dealing with technological measures would profoundly change the nature of existing Canadian copyright law. Up to now, copyright protection applied to creative material only: for example, books, music or television programs. As new forms of works were developed, new categories of copyright protection were added to the *Copyright Act*. For example, sound recordings, performances and communication signals were added over time. By applying a technological measure, rights holders would have a new and different type of legal protection which has nothing to do with acts related to creative material. This long-standing structure of the current copyright law would be changed by Bill C-61 because it would protect, for the first time, something other than creative works. If enacted, the provisions in Bill C-61 would protect technology.

⁹ Reference: page 39, section 41.2(2)(ii) of the Bill.

¹⁰ Reference: page 38, section 41.19.

(ii) Users' rights should be defined by Parliament.

The CTF believes that the balance between users' and owners' rights must not be lost in the copyright reform process. Creators still need to be provided with rights. Those rights need to be balanced by users' rights serving the public interest. One major challenge for Parliament in adapting the current copyright law to digital technology is the fact that digital technology provides rights holders with the ability to use technology to deny access. If rights holders are provided with legal protection for technological measures as proposed in Bill C-61, they would effectively be provided with the ability to prevent users from exercising their rights as provided in the Act.

Clause 31 of Bill C-61 differentiates between access and use control technological measures. Although users may not circumvent an access control, they may circumvent a use control, if the circumvention is to do something permitted under the *Copyright Act*. Two examples will illustrate the consequences for users:

1. an access control would prevent a teacher from exercising the right to reproduce and publicly perform news and news commentary under section 29.5 of the Act; and
2. a student who has a user's right to make a single copy of a journal article for research purposes under fair dealing is prevented from exercising this right if an access control technological measure is employed by the rights holder.

In both examples, the consequence of a rights holder attaching an access control technological measure would be that users are prevented from exercising the rights that the Act otherwise provides them. The provisions in Bill C-61 dealing with technological measures place excessive control in the hands of rights holders. Parliamentary passage of the provisions in Bill C-61 dealing with technological measures would irrevocably damage the delicate balance between copyright owners and users. This balance has been carefully crafted by successive Parliament over many decades.

(iii) Technological measure provisions exceed WIPO treaty requirements.

Canada has signed but not yet ratified the World Intellectual Property Organization's (WIPO) *Copyright Treaty* and the *Performances and Phonograms Treaty*. These treaties 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. By signing these treaties, Canada has signaled its intention to

take the next step of bringing its legislation into conformity with the obligations in the treaties.

The provisions in Bill C-61 dealing with technological measures exceed what is required to meet the obligations in the WIPO treaties. This view is supported by the analysis found in the 1998 *Discussion Paper on the Implementation of the WIPO Copyright Treaty* that was commissioned by the Department of Canadian Heritage and Industry Canada. The authors of the study recommended a number of possible legislative amendments to bring Canadian law into compliance with the WIPO Copyright Treaty. Their recommendations included a possible prohibition against the bypassing or removal of TMs for the purpose of infringing copyright.¹¹

It is not necessary to prohibit the circumvention of technological measures that have nothing to do with infringing copyright. A new layer of copyright protection for technology, as opposed to protecting a category of creative material, is not required under Article 11 of the *WIPO Copyright Treaty* or Article 18 of the *WIPO Performances and Phonogram Treaty*. Other countries¹² have become member states of both treaties without extending copyright protection to technological measures themselves but by prohibiting circumvention only for infringing purposes.

(iv) Users' rights are not a regulatory matter.

The provisions in Clause 31, section 41.2 (2)(a) (i)(iii) and (b) of Bill C-61, provide for the possibility of enacting regulations permitting users to circumvent access control technological measures in the event that the Governor in Council is convinced that users' rights are being adversely affected. Placing the exercise of

¹¹ Johanne Daniel and Lesley Ellen Harris, *Discussion Paper on the Implementation of the WIPO Copyright Treaty*, July 1998, pages 5 and 6.

¹² In Australia, for example, 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.

users' rights in the hands of regulators instead of Parliament is not appropriate. Regulation making is not subject to Parliamentary scrutiny. The debate about whether rights holders should be provided with the power to prevent users from exercising their rights by applying technological measures must occur publicly, in the House of Commons, and be decided by Parliament.

(v) Technological measures provisions are open to constitutional challenge.

Circumvention of technological measures is subject to criminal remedies in Clause 32 of Bill C-61. Circumvention of a technological measure is a strict liability offence. This means that if the act of circumvention occurs, the accused is guilty solely on the basis that the act of circumvention occurred. When strict liability offences are created, the crime must be clearly defined. The definition of the strict liability offence of circumventing a technological measure in Bill C-61 is not clear. If a circumventer cannot be sure whether a technological measure is a use or access control, then the user cannot be sure if he or she is committing a crime. It would not be a defence for the alleged criminal to prove that he or she thought the technological measure was a use control, when it really was an access control, because the offence is subject to strict liability. In these circumstances, the criminal sections in Bill C-61 are open to constitutional challenge on the basis that they violate the constitutional law principles requiring that criminal behaviour be clearly defined.

(vi) Distinguishing “access” and “use” TMs is unworkable.

Even if Parliament does decide to extend the protection of the *Copyright Act* to technological measures, the regime in Bill C-61 to accomplish this result is unworkable.

According to Bill C-61, when the rights holder employs an access control technological measure, circumvention by a user is absolutely prohibited, even if the circumvention is for the purpose of doing something that the user has a right to do under other provisions in the *Copyright Act*. Although users would never be permitted to circumvent an access control, they may circumvent a use control, if the circumvention is to do something that is permitted under the *Copyright Act*. For example, pursuant to Bill C-61, a teacher may circumvent a use control technological measure, but not an access control technological measure, to make a reproduction for the purpose of instruction. A second example: a student may circumvent a use control technological measure, but not an access control technological measure, to make a copy that is permitted under fair dealing. These are two examples of why the dual TM regime is unworkable in practice.

For a lay person, it is virtually impossible to distinguish between a use and access control technological measure. In theory, the distinction may be understandable. However, as a practical matter the regime is unworkable.

Clause 31, section 41, defines “technological measure” as follows:

“technological measure” means any effective technology, device or component that, in the ordinary course of its operation,

- (a) controls access to a work, to a performer’s performance fixed in a sound recording or to a sound recording and whose use is authorized by the copyright owner; or
- (b) restricts the doing – with respect to a work, to a performer’s performance fixed in a sound recording or to a sound recording – of any act referred to in section 3, 15 or 18 and any act for which remuneration is payable under section 19.

Consider the complexity of this definition to identify the problems a student or teacher would have in deciding whether or not they can make a copy of a work under fair dealing or for preservation.

1. First the student or teacher will have to know what a technological measure is.
2. Then they will have to know enough about the copyright law to understand that the copyright law distinguishes between use and access control technological measures.
3. Then they will have to make a judgement as to whether the technological measure that they are dealing with is an access or use technological measure.
4. Then they will have to know that the *Copyright Act* provides that circumvention of an access control technological measure is prohibited, even if the copy they intend to make is something that other provisions in the *Copyright Act* gives them the right to do, like making a reproduction for the purposes of instruction or engaging in fair dealing.
5. Then they will also need to know that if the technological measure is a use control, they can circumvent it to do something that other provisions in the *Copyright Act* permit them to do, such as making a reproduction for the purpose of instruction or engaging in fair dealing.
6. If the technological measure controls both access and use, then they have to know they cannot circumvent the access control measure even though the *Copyright Act* provides that circumvention of a technological measure controlling use is permitted for uses such as making a reproduction for the purpose of instruction or engaging in fair dealing.

Provisions such as these will never work in practice. They are too complex.

Even computer and technical experts, the people who are supposed to know, understand, and be able to explain the difference between an “access control” and a “use control” technological measure, have difficulty with the practical application of the distinction:

The fact that there are policy makers wanting to make a legal distinction between “access controls” and “use controls” suggests that they may not be aware that in practice nearly every conceivable “use control” starts with an “access control ...”.¹³

The linkage between access and use controls is illustrated by the most common uses of technological measures applied to content protected by copyright:

1. Content is encrypted and only distributed in encrypted form.
2. To access the content the user must have the right decryption key.
3. The decryption key is embedded in either a specific device or software.
4. To access the content, the user must use an authorized device or software.
5. The device or software has technological locks to prevent the owner of the device or software from gaining access without the decryption key.¹⁴

Technological measures make copyright-protected content inaccessible without the right technological key. Whether or not one is technologically knowledgeable, all technological measures effectively make content inaccessible. A user must always have access before even considering the uses to which the content can be put. When users are prohibited from circumventing access controls, as is proposed in Bill C-61, they are effectively denied all their users’ rights in the *Copyright Act*.

(vii) Distinguishing between “access” and “use” TMs is outdated.

Basing copyright reform on a technical distinction between access control and use control technological measures is a very shaky legislative foundation because the distinction between the two is becoming less and less clear. This differentiation may have been workable in 1998 when the *Digital Millennium Copyright Act* was enacted in the United States, considering the technology at that time. Since 1998 the distinction between use and access controls has become increasingly blurred. The *Consultation Paper On Digital Copyright Issues*¹⁵ released in 2001 by the Department of Canadian Heritage and Industry Canada identified as a core principle that the framework for copyright should be

¹³ <http://blogs.itworldcanada.com/insights/2008/07/31/access-and-use-tms/>

¹⁴ Id.

¹⁵ http://strategis.ic.gc.ca/epic/site/crp-prda.nsf/en/h_rp01104e.html on page 15.

technologically neutral and highlighted the importance of passing legislation that establishes technologically neutral principles. These statements remain valid today. Basing copyright law reform on continually evolving technology is unsound and unwise.

For all of these reasons, the CTF recommends that Clause 31 be deleted and replaced by a regime providing that circumvention for the purpose of infringing copyright is prohibited. This would be accomplished by the following amendment to Bill C-61:

5.4 Amendment

Clause 31 should be deleted from Bill C-61 in its entirety and the following substituted:

41.1 (1) An owner of copyright in a work, a performer's performance fixed in a sound recording or a sound recording and a holder of moral rights in respect of a work or such a performer's performance are, subject to this Act, entitled to all remedies by way of injunction, damages, accounts, delivery up and otherwise that are or may be conferred by law for the infringement of a right against a person who, without the consent of the copyright owner or moral rights holder, circumvents, removes or in any way renders ineffective a technological measure protecting any material form of the work, the performer's performance or the sound recording for the purpose of an act that is an infringement of the copyright in it or the moral rights in respect of it or for the purpose of making a copy referred to in subsection 80(1).

(2) If a technological measure protecting a material form of a work, a performer's performance or a sound recording referred to in subsection (1) is removed or rendered ineffective in a manner that does not give rise to the remedies under that subsection, the owner of copyright or holder of moral rights nevertheless has those remedies against a person who knew or could reasonably be expected to know that the measure has been removed or rendered ineffective and, without the owner's or holder's consent, does any of the following acts with respect to the material form in question:

- (a) sells it or rents it out;*
- (b) distributes it to such an extent as to prejudicially affect the owner of the copyright;*
- (c) by way of trade, distributes it, exposes or offers it for sale or rental or exhibits it in public; or*
- (d) imports it into Canada for the purpose of doing anything referred to in any of paragraphs (a) to (c)*

The definition of “technological measure” in Clause 31, section 41, should be deleted and the following substituted:

“technological measure” means any technology, device or component that, in the ordinary course of its operation, restricts the doing — in respect of a material form of a work, a performer’s performance fixed in a sound recording or a sound recording — of any act that is mentioned in section 3, 15 or 18 or that could constitute an infringement of any applicable moral rights;

The CTF, together with other national education organizations representing seven million Canadians – from teachers to school boards, parent groups to educational institutions – urges Parliament to adopt these amendments.

6. CIRCUMVENTION SERVICES AND DEVICES

6.1 Bill C-61

Reference: Clause 31, sections 41.1(b) and (c), pages 31 and 32.

6.2 Legislative Intent

Bill C-61, clause 31, section 41.1(1)(b) prohibits the offering or providing of services primarily for the purpose of circumventing a technological measure. Clause 31, section 41.1(1)(c) prohibits the importation, manufacture and providing of any technology, device or component that is designed or produced primarily for the purpose of circumventing a technological measure.

6.3 Assessment

The CTF believes that the offering of circumvention services and the importation, manufacture and provision of any technology, device or component designed or produced primarily for the purpose of circumventing a technological measure should be permitted, when the circumvention is for a purpose that is not an infringement of copyright or moral rights. This is consistent with our recommended amendment regarding technological measures. Since we believe that circumvention of technological measures for non-infringing purposes should be permitted, so should circumvention services, technology, devices and components be available for non-infringing purposes. If users circumvent

technological measures for non-infringing purposes, they will need circumvention services, technology, devices and components that enable circumvention.

6.4 Amendment

It is recommended that Clause 31 be deleted in its entirety and the following substituted:

An owner of copyright in a work, a performer's performance fixed in a sound recording or a sound recording and a holder of moral rights in respect of a work or such a performer's performance are, subject to this Act, entitled to all remedies by way of injunction, damages, accounts, delivery up and otherwise that are or may be conferred by law for the infringement of a right against a person who offers or provides a service to circumvent, remove or render ineffective a technological measure protecting a material form of the work, the performer's performance or the sound recording and knew or could reasonably be expected to know that providing the service will result in an infringement of the copyright or moral rights.

The CTF, together with other national education organizations representing seven million Canadians – from teachers to school boards, parent groups to educational institutions – urges Parliament to adopt this amendment.

7. PERCEPTUALLY DISABLED

7.1 Bill C-61

Reference: Clause 31, section 41.16, page 37.

7.2 Legislative Intent

Section 41.16 permits persons with perceptual disabilities, and those who act on their behalf, to circumvent access control technological measures for the purpose of producing materials in alternate formats for persons with perceptual disabilities. More specifically, Section 41.16(1) permits persons with a perceptual disability, and those acting on their behalf, to circumvent an access control technological measure for the purpose of making a work, a performer's performance fixed in a sound recording, or a sound recording, perceptible to a person with a perceptual disability. Section 41.16(2) states that the provision of a

circumvention service, technology, device or component to persons with a perceptual disability, and those acting on their behalf, is permitted, but only to the extent that the service, technology, device or component does not unduly impair the technological measure.

7.3 Assessment

There are several reasons why section 41.16 does not achieve its intended purpose.

First, to utilize this provision requires technical expertise — something that the perceptually disabled, and those who act on their behalf, frequently do not have.

Second, those lacking the technical expertise must engage the services of someone who does. This represents additional costs to the already significant costs of producing materials in alternate formats for persons with perceptual disabilities.

Third, circumventing technological measures adds another step in the process of producing materials in alternate formats for persons with perceptual disabilities. Timely production and delivery of producing materials in alternate formats for persons with perceptual disabilities is critical.

Fourth, to come within the scope of section 41.16(2) requires that the service, technology, device or component does not unduly impair the technological measure. What this means in relation to the production of materials in alternate formats for persons with perceptual disabilities is unclear. Some see this as requiring that the technological measure be “put back” after the production of an alternate format. Those who work in this field argue that this requirement is neither technically feasible nor workable.

Fifth, section 41.16 does not apply to materials that are “borrowed or rented”. The ability to borrow materials is central to serving the needs of the perceptually disabled. This restriction therefore should be removed.

7.4 Amendment

Bill C-61 should be amended to provide that circumvention of technological measures and the provision of a circumvention service, technology, device or component is prohibited only where the purpose of the circumvention is to infringe copyright. The wording of the necessary amendments to achieve this objective is set out earlier in section 5 on “Technological Measures” and section 6 on “Circumvention Services and Devices.”

8. RIGHTS MANAGEMENT INFORMATION

8.1 Bill C-61

Reference: Clause 31, section 41.21, pages 39, 40 and 41.

8.2 Legislative Intent

Clause 31, section 41.21, provides protection for rights holders against the removal or alteration of rights management information.

8.3 Assessment

The WIPO *Copyright Treaty* and the WIPO *Performance and Phonograms Treaty* require countries ratifying them to 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 both 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 of the work or other subject matter.¹⁶

The CTF has a number of amendments to suggest with regard to the provisions in Bill C-61 dealing with rights management information. First, the removal or alteration of rights management information should not be subject to remedies where the information interferes unreasonably with an authorized display or reproduction. Second, the fact that rights management information may not be legally binding in Canada should be recognized in the *Copyright Act*. Protecting rights management information should not be construed as confirming the legal validity of the information. Third, as to the appropriate level of protection, the United Kingdom’s *Copyright and Related Rights Regulations 2003* narrows 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. Bill C-61 should provide similar limits. Fourth, the copyright *owner* or the holder of any right under copyright should be made subject to the same remedies (injunction, damages, accounts, delivery up and otherwise that are or may be conferred by

¹⁶ WIPO *Copyright Treaty*, Article 12 and WIPO *Performances and Phonogram Treaty*, Article 19.

law) for knowingly making false or misleading statements in rights management information.

8.4 Amendments

The definition of “rights management information” in Clause 31, section 41.21(4) should be deleted and the following substituted:

“rights management information” means information that

(a) the copyright owner or the holder of any right under copyright has attached to or embodied in a material form of a work, a performer’s performance fixed in a sound recording or a sound recording, or appears in connection with its communication to the public by telecommunication, and

(b) identifies or permits the identification of the work or its author, the performance or its performer, the sound recording or its maker or any of them, or concerns the terms or conditions of its use;

Section 41.21(1), (2) and (3) should be deleted and the following substituted:

(1) The owner of copyright in a work, a performer’s performance fixed in a sound recording or a sound recording is, subject to this Act, entitled to all remedies by way of injunction, damages, accounts, delivery up and otherwise that are or may be conferred by law for the infringement of a right against a person who during the term of copyright and without the consent of the copyright owner, knowingly removes or alters any rights management information in electronic form that is attached to or embodied in any material form of the work, the performer’s performance or the sound recording or appears in connection with its communication to the public by telecommunication and knows, or ought to know, that the removal or alteration will facilitate or conceal any infringement of the owner’s copyright.

(2) The owner of copyright referred to in subsection (1) has the same remedies against a person who, without the owner’s consent, knowingly does any of the following acts with respect to any material form of the work, the performer’s performance or the sound recording and knows or ought to know that the rights management information has been removed or altered in a way that would give rise to a remedy under subsection (1):

(a) sells it or rents it out;

(b) distributes it to such an extent as to prejudicially affect the owner of the copyright;

(c) by way of trade, distributes it, exposes or offers it for sale or rental or exhibits it in public;

(d) imports it into Canada for the purpose of doing anything referred to in any of paragraphs (a) to (c); or

(e) communicates it to the public by telecommunication.

(3) The removal or alteration of rights management information with respect to any material form of the work, the performer's performance or the sound recording is not an infringement of copyright where such information interferes unreasonably with the authorized display or reproduction of a copyright work or other subject matter.

(4) Rights management information is only an assertion made by a rights owner, which may or may not be legally binding in Canada.

(5) The owner of copyright in a work, a performer's performance fixed in a sound recording or a sound recording is, subject to all remedies by way of injunction, damages, accounts, delivery up and otherwise that are or may be conferred by law for knowingly making false or misleading statements in rights management information that is attached to or embodied in any material form of the work, the performer's performance or the sound recording or appears in connection with its communication to the public by telecommunication.

The CTF, together with other national education organizations representing seven million Canadians – from teachers to school boards, parent groups to educational institutions – urges Parliament to adopt these amendments.

9. INTERNET SERVICE PROVIDER (ISP) LIABILITY

9.1 Bill C-61

References:

Clause 21, subsection 31.1(1) on page 25 regarding providing network services.

Clause 21, subsection 31.1(2) on page 26 regarding caching.

Clause 21, subsection 31.1(4) on page 26 regarding hosting.

Clause 31, subsections 41.25 and 41.26 on pages 42 and 43 requiring notice to be sent when infringement is claimed by a rights holder.

Clause 31, subsection 41.27 on pages 44 and 45 regarding the use of information location tools by search engines.

9.2 Legislative Intent

On June 12, 2008, when Bill C-61 was introduced, the government released a number of explanatory notes. Bill C-61 contains provisions to address two things: first, the liability of ISPs for what happens on their networks, and second, the role ISPs should play in curbing copyright-infringing activities on their networks.

As to the first matter, Bill C-61 provides that ISPs are not liable for infringements of subscribers who post infringing material on the Internet.¹⁷ ISPs are intermediaries that enable or facilitate connections to the Internet. Bill C-61 clarifies that an ISP that facilitates or enables connectivity is not liable for infringing acts of their subscribers.

Bill C-61 does, however, require ISPs to discourage infringing uses of their facilities by participating in a “notice and notice” regime. ISPs are required to forward any notice they receive from a copyright owner to a subscriber who is alleged to be engaged in infringing activities on-line. ISPs are required to keep records that would allow the subscriber to be identified in any court proceeding that may ensue. The government’s rationale for these record-keeping obligations is that ISPs are often the only parties that can identify and warn subscribers when they are accused of copyright infringement. If an ISP does not keep the required records or fails to forward notices, it would be liable for civil damages. Under Canadian law, the courts have the ability to order that access to infringing material be blocked in appropriate cases.

9.3 Assessment

The CTF agrees with the manner in which ISP liability and the obligations regarding notice of alleged infringement have been addressed in Bill C-61. 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. Many educational institutions provide Internet connections to their respective teachers, students and staff. It is impossible, in practice, to monitor or screen the activities of users of their network services. On that basis, educational institutions and libraries when they act as 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 subscribers.

We also agree with the record-keeping obligations placed on ISPs in Bill C-61. Since ISPs are often the only parties that can identify and warn subscribers when they are accused of copyright infringement, it is appropriate that they be required

¹⁷ Government Backgrounder, *Questions and Answers, Amendments to the Copyright Act*, Government of Canada, June 12, 2008, see questions 10 and 11, pages 3 and 4.

to play a role in discouraging copyright infringement. If an ISP does not keep the required records or fails to forward notices, it would be liable for civil damages.

An ISP receiving a notice of claimed infringement will have obligations to meet regarding the giving of notices of claimed infringement. For example, the ISP is obligated to identify the owner of the IP address, to forward the notice to the allegedly infringing IP address, to inform the copyright owner of its forwarding, and to keep records in the event that a proceeding for infringement is commenced by the rights holder.

There will be costs associated with fulfilling these obligations. For example, the University of Regina calculated the cost to the university for each notice it processed to be \$150 to \$200 depending on the inquiry and the difficulty in locating the source or the number of individuals with access to a particular IP address. The number of inquiries received by the university was estimated to be between fifteen and twenty inquiries per month. In September 2008, the university estimated the cost of fifteen inquiries, using the \$150 figure, to be \$2,250 per month.

It is appropriate that costs associated with the enforcement of private rights under the *Copyright Act* be borne by the rights holder and not the ISP. Previous legislative proposals on ISP liability provided for regulations to be adopted that establish the maximum fee that may be charged for fulfilling these notice obligations. The CTF recommends that the Act be amended to provide that fees to be paid related to notices forwarded by ISPs at the request of a rights holder be borne by the rights holder.

10. Remedies

10.1 Bill C-61

Reference: Clause 31, section 41.19, page 38.

10.2 Legislative Intent

Clause 31, section 41.19 relates to technological measures. The section provides that the only remedy that can be awarded against a library, archive, museum or educational institution engaged in a prohibited act of circumventing a technological measure is an injunction, if a court is satisfied that the defendant was not aware, and had no reasonable grounds to believe, that the defendant's circumvention was prohibited.

10.3 Assessment

The CTF believes that this section is too narrow. Its legislative intent should be extended to include fair dealing, as well as circumvention of technological measures. We believe that an injunction, only, should be available against a user of a copyrighted work who has reasonable grounds to believe that their dealing with a protected work is fair.

The Supreme Court of Canada clarified the application of fair dealing in a general way in the 2004 decision in the CCH case.¹⁸ This clarification has opened up the possibility that fair dealing can be used by students and teachers to permit many routine educational activities. To do so, determinations must be made as to whether the activity falls within the fair dealing provision. However, the possibility of damages, and particularly statutory damages, being awarded against a student, teacher, staff or educational institution, has made many reluctant to exercise users' rights under fair dealing for fear of being wrong. The threat of high damage awards for infringement, even if the infringement is unintended, discourages the use of modern technologies in the process of teaching and learning.

Very high damage awards are possible under the statutory damages regime. The statutory damages regime in the current Canadian *Copyright Act* operates on the basis of strict liability. It allows a copyright holder to obtain an award in an amount ranging from \$500 to \$20,000 for each instance of copyright infringement, even when a person is unaware that his or her activity may infringe copyright. It is clear from the size of these financial penalties that the statutory damages regime is intended to address commercial piracy. The size of the possible awards is completely disproportionate in the context of copying under fair dealing in a not-for-profit library.

Canadian law in this area contrasts sharply with the treatment of fair use copying under the statutory damages regime in U.S. copyright law. The Canadian statutory damages regime closely parallels the regime in the United States *Copyright Act*, but the Canadian Act omits a crucial element of the U.S. statutory damages framework. Section 504 of the U.S. *Copyright Act* insulates non-profit educational institutions, libraries, and their employees from a claim of statutory damages where a person making a copy has reasonable grounds to believe that the copy would qualify as fair use. United States law clearly recognizes that it is inappropriate to allow statutory damages to be awarded against individuals employed by not-for-profit public institutions who in good faith engage in fair use copying.

¹⁸ CCH Canadian Ltd. v. Law Society of Upper Canada, 2004 SCC 13.

This type of protection would be incorporated into Canadian law if section 41.19 included a reference to fair dealing in sections 29, 29.1 and 29.2. Such an amendment would preclude an award of any type of damages against any individual who has reasonable grounds to believe that his or her copying is fair dealing. The only remedy that could be awarded would be an injunction. The current law punishes those who may have no intention of infringing copyright but make an incorrect decision about the scope of fair dealing, because what can be done under fair dealing is unclear. That should be changed.

10.4 Amendment

Clause 31, section 41.19 should be amended as follows:

41.19 If a court finds that a defendant that is a library, archive or museum or educational institution, or that is employed by or is a student or patron of such an institution, has contravened subsection 29, 29.1, 29.2 or 41.1(1) and the defendant satisfies the court that it, he or she did not know, and could not reasonably be expected to know, that its actions constituted a contravention of those sections, the plaintiff is not entitled to any remedy other than an injunction.

The CTF, together with other national education organizations representing seven million Canadians – from teachers to school boards, parent groups to educational institutions – urges Parliament to adopt this amendment.

11. SUMMARY OF AMENDMENTS

1. Clause 18, section 30.04(5) should be amended to provide:

(5) Subsection (1) does not apply if the educational institution or a person acting under its authority knew or could reasonably have been expected to know that the work or other subject-matter was made available through the Internet without the consent of the copyright owner. (See section 3.5 of this submission)

2. *Nothing in sections 29.4 through 32.2 of this Act is intended to limit or otherwise alter the scope of fair dealing.*

3. Clause 18, section 30.01(5)(a) should be deleted.

4. Clause 18, section 30.01(5)(c) should be amended as follows:

*30.01(5) The educational institution and any person acting under its authority, except a student, shall
(c) take, in relation to communication by telecommunication of the lesson in digital form, measures that can reasonable be expected to prevent students from communicating it other than as they may do under this section: and (See section 4.6 of this submission)*

5. Clause 31 should be deleted from Bill C-61 in its entirety and the following substituted with respect to technological measures:

41.1 (1) An owner of copyright in a work, a performer's performance fixed in a sound recording or a sound recording and a holder of moral rights in respect of a work or such a performer's performance are, subject to this Act, entitled to all remedies by way of injunction, damages, accounts, delivery up and otherwise that are or may be conferred by law for the infringement of a right against a person who, without the consent of the copyright owner or moral rights holder, circumvents, removes or in any way renders ineffective a technological measure protecting any material form of the work, the performer's performance or the sound recording for the purpose of an act that is an infringement of the copyright in it or the moral rights in respect of it or for the purpose of making a copy referred to in subsection 80(1).

(2) If a technological measure protecting a material form of a work, a performer's performance or a sound recording referred to in subsection (1) is removed or rendered ineffective in a manner that does not give rise to the remedies under that subsection, the owner of copyright or holder of moral rights nevertheless has those remedies against a person who knew or could reasonably be expected to know that the measure has been removed or rendered ineffective and, without the owner's or holder's consent, does any of the following acts with respect to the material form in question:

- (a) sells it or rents it out;*
- (b) distributes it to such an extent as to prejudicially affect the owner of the copyright;*
- (c) by way of trade, distributes it, exposes or offers it for sale or rental or exhibits it in public; or*
- (d) imports it into Canada for the purpose of doing anything referred to in any of paragraphs (a) to (c).*

The definition of "technological measure" in Clause 31, section 41, should be deleted and the following substituted:

“technological measure” means any technology, device or component that, in the ordinary course of its operation, restricts the doing — in respect of a material form of a work, a performer’s performance fixed in a sound recording or a sound recording — of any act that is mentioned in section 3, 15 or 18 or that could constitute an infringement of any applicable moral rights; (See section 5.4 of this submission)

6. Clause 31 should be deleted in its entirety and the following substituted with respect to providing circumvention services:

An owner of copyright in a work, a performer’s performance fixed in a sound recording or a sound recording and a holder of moral rights in respect of a work or such a performer’s performance are, subject to this Act, entitled to all remedies by way of injunction, damages, accounts, delivery up and otherwise that are or may be conferred by law for the infringement of a right against a person who offers or provides a service to circumvent, remove or render ineffective a technological measure protecting a material form of the work, the performer’s performance or the sound recording and knew or could reasonably be expected to know that providing the service will result in an infringement of the copyright or moral rights.

7. The definition of “rights management information” in Clause 31, section 41.21(4) should be deleted and the following substituted:

“rights management information” means information that

(a) the copyright owner or the holder of any right under copyright has attached to or embodied in a material form of a work, a performer’s performance fixed in a sound recording or a sound recording, or appears in connection with its communication to the public by telecommunication, and

(b) identifies or permits the identification of the work or its author, the performance or its performer, the sound recording or its maker or any of them, or concerns the terms or conditions of its use;

Section 41.21(1), (2) and (3) should be deleted and the following substituted:

(1) The owner of copyright in a work, a performer’s performance fixed in a sound recording or a sound recording is, subject to this Act, entitled to all remedies by way of injunction, damages, accounts, delivery up and otherwise that are or may be conferred by law for the infringement of a right against a person who during the term of

copyright and without the consent of the copyright owner, knowingly removes or alters any rights management information in electronic form that is attached to or embodied in any material form of the work, the performer's performance or the sound recording or appears in connection with its communication to the public by telecommunication and knows, or ought to know, that the removal or alteration will facilitate or conceal any infringement of the owner's copyright.

(2) The owner of copyright referred to in subsection (1) has the same remedies against a person who, without the owner's consent, knowingly does any of the following acts with respect to any material form of the work, the performer's performance or the sound recording and knows or ought to know that the rights management information has been removed or altered in a way that would give rise to a remedy under subsection (1):

- (a) sells it or rents it out;*
- (b) distributes it to such an extent as to prejudicially affect the owner of the copyright;*
- (c) by way of trade, distributes it, exposes or offers it for sale or rental or exhibits it in public;*
- (d) imports it into Canada for the purpose of doing anything referred to in any of paragraphs (a) to (c); or*
- (e) communicates it to the public by telecommunication.*

(3) The removal or alteration of rights management information with respect to any material form of the work, the performer's performance or the sound recording is not an infringement of copyright where such information interferes unreasonably with the authorized display or reproduction of a copyright work or other subject-matter.

(4) Rights management information is only an assertion made by a rights owner, which may or may not be legally binding in Canada.

(5) The owner of copyright in a work, a performer's performance fixed in a sound recording or a sound recording is, subject to all remedies by way of injunction, damages, accounts, delivery up and otherwise that are or may be conferred by law for knowingly making false or misleading statements in rights management information that is attached to or embodied in any material form of the work, the performer's performance or the sound recording or appears in connection with its communication to the public by telecommunication. (See section 8.4 of this submission.)

8. Clause 31, section 41.19 should be amended as follows:

41.19 If a court finds that a defendant that is a library, archive or museum or educational institution, or that is employed by or is a student or patron of such an institution, has contravened subsection 29, 29.1, 29.2 or 41.1(1) and the defendant satisfies the court that it, he or she did not know, and could not reasonably be expected to know, that its actions constituted a contravention of those sections, the plaintiff is not entitled to any remedy other than an injunction. (See section 10.4 of this submission.)