Legislative Summary **LS-613E**

BILL C-61, AN ACT TO AMEND THE COPYRIGHT ACT

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LEGISLATIVE HISTORY OF BILL C-61

HOUSE OF COMMONS		SENATE	
Bill Stage	**Date**	**Bill Stage**	**Date**
First Reading:	12 June 2008	First Reading:	
Second Reading:		Second Reading:	
Committee Report:		Committee Report:	
Report Stage:		Report Stage:	
Third Reading:		Third Reading:	

Royal Assent:

Statutes of Canada

This bill did not become law before the 39th Parliament ended on 7 September 2008.

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

Legislative history by Michel Bédard

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BILL C-61, AN ACT TO AMEND THE COPYRIGHT ACT*

BACKGROUND

Bill C-61, An Act to amend the Copyright Act, was introduced in the House of Commons by the Minister of Industry, the Honourable Jim Prentice, and received first reading on 12 June 2008. The bill adds new rights and exceptions to the *Copyright Act*(1) primarily to ratify international treaties that address issues surrounding copyright in the digital environment, to further regulate the use of copyrighted works by educational institutions, libraries, archives and museums, and to enact personal use exemptions for individuals.

A. Copyright Law in General

In general, copyright includes a collection of time-limited exclusive property rights (such as the right to reproduce a "work" or to communicate it to the public) which are automatically conferred on the creator or author of a copyrighted work. These rights are granted to authors in order to encourage the creation and public dissemination of works and to reward the author's labour in his or her creation. Copyright applies to all original literary, dramatic, musical and artistic works.(2)

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

(1) *Copyright Act*, R.S.C. 1985, c. C-42.

(2) For a summary of copyright and related rights, see World Intellectual Property Organization, *Understanding Copyright and Related Rights*, WIPO Publication 909(E), http://www.wipo.int/freepublications/en/intproperty/909/wipo_pub_909.pdf.

Copyright also protects “neighbouring” or “related” rights, which are rights in a work granted to individuals who may not traditionally be considered the author of the work, as well as rights in a work that does not meet the traditional definition of a copyrightable work. Related rights are less extensive than the full complement of economic rights otherwise granted to the author of a work. There are three types of works protected through related rights, namely, i) performers’ performances; ii) sound recordings; and iii) communication signals.

Copyright aims to strike a balance between the rights granted to authors and creators and the use of existing works by the public for commercial and non-commercial purposes. Taking into account the rights of future authors and creators, copyright only attaches to fixed ideas, or those ideas that are expressed in tangible form. To ensure an adequate supply of works for commercial use, copyright is limited to a 50-year term, after which works become part of the public domain and freely available. For works that are still protected by copyright and not in the public domain, the use of works for certain non-commercial purposes is allowed through the doctrine of “fair use” or “fair dealing.”

In Canada, copyright is a purely statutory right and based solely on the provisions found in the Act. The full list of economic rights pertaining to copyright in a work is found in section 3 of the Act. Related rights, which are also economic rights, can be found in Part II of the Act. An author may assign any or all of these economic rights to a third party, who then becomes a copyright holder.

Moral rights constitute another form of copyright; these rights belong to the author of a work and generally may not be assigned to another party.

Violation of any listed right, whether economic, related or moral, results in copyright or moral rights infringement and could lead to civil remedies for the copyright holder or criminal penalties against the infringer. Possible remedies include: damages, lost profits, injunctions, fines, imprisonment, or royalties, depending on the severity of the infringement and the type of work or rights infringed.

B. Copyright and International Treaties

International treaties on copyright have been central to the development of copyright law in Canada. International treaties on copyright are ratified and implemented through legislative amendments to the Act.

In 1997 Canada signed two World Intellectual Property Organization (WIPO) treaties: the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), known as "the WIPO Internet treaties," which address copyright issues in digital works and on the Internet. Together, the WIPO internet treaties establish copyright protection for performers and makers of sound recordings of performances similar to that granted the authors of other works.

The WIPO Internet treaties also create two new rights for performers and sound recording makers, namely, (i) the right to authorize the distribution of their work, or a copy thereof, in physical form to the public, and (ii) the right to make their work available for download on the Internet. These new rights are called, respectively, "first distribution rights" and "making available rights."

Additionally – and this has become one of the most contentious issues in debates surrounding copyright reform – the WIPO Internet treaties stipulate that member countries must create legislation to prevent the circumvention of a technological measure which is used to control access and/or restrict the use of a work (also known as a digital lock) and must provide remedies to prevent the alteration and removal of rights management information used to identify a work and track subsequent use of the work. Legal protection and remedies to prevent circumvention are now commonly called anti-circumvention laws.

C. Copyright Reform in Canada

The last time the Act underwent significant amendment was in 1997, a time when the evolving digital revolution with its rapid changes in technologies made it difficult to predict the directions new technologies would take. For example, inexpensive digital music storage devices and commercial music downloading websites had yet to be invented. In order to gauge the effectiveness of the 1997 amendments, section 92 of the Act mandated a review within five years of the proclamation of the changes.

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

On 25 March 2004, the Minister of Canadian Heritage and the Minister of Industry jointly submitted a *Status Report on Copyright Reform* to the Standing Committee on Canadian Heritage. The committee reviewed the status report and held a series of meetings to consider six short-term issues, namely private copying and ratification of the WIPO Internet treaties; photographic works; Internet service provider liability; use of Internet material for educational purposes; technology-enhanced learning; and inter-library loans. In May 2004, the Committee released its findings and nine recommendations in its *Interim Report on Copyright Reform*. Among other things, the committee recommended that:

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

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

D. Significant Events in the Period Between the Introduction of Bills C-60 and C-61

Although the Act was not amended between the 2006 election and the introduction of Bill C-61, two copyright-related reports were published by Industry Canada during that period. The first report examined the economic impact of reforming Canada's

private copying regime. The second report examined the economic impact on Internet service providers in Canada of the notice-and-notice regime whereby the providers send a notice to a possible copyright infringer after receiving a claim from a copyright holder.

In May 2007, Industry Canada released a study investigating the effects on music sales of music downloading;(3) the study did not find a connection between the downloading and sharing of music online and decreased sales volume of music CDs in Canada.

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

In October 2007, the United States, in cooperation with other countries, began discussions on a multilateral agreement to decrease trade in counterfeit and pirated goods: the Anti-Counterfeiting Trade Agreement (ACTA). Prevention of piracy of copyrighted works on DVDs, CDs and other optical discs as well as the distribution of works on the Internet is a priority under ACTA. Opponents of ACTA have criticized the secret negotiations, which led to a public consultation process administered by Foreign Affairs and International Trade Canada; a private consultation with industry lobbyists also occurred. These events emphasize the importance the recorded music and movie industry places on preventing piracy.

E. Genesis of Bill C-61

In the Speech from the Throne opening the 2nd session of the 39th Parliament in October 2007, the government emphasized that improved protection for intellectual property rights and copyright reform would be an important issue for Parliament. An Act to amend the Copyright Act was placed on the *Notice Paper* on 7 December 2007, but the bill was not introduced in the House of Commons until 12 June 2008. Among the reasons for the delay was thought to be vocal concern over proposed provisions for the protection of digital works that may be similar to those found in American copyright legislation and generally thought to unduly limit the rights of users of copyrighted works. Provisions

(3) See B. Andersen and M. Frenz, *The Impact of Music Downloads and P2P File-Sharing on the Purchase of Music: A Study for Industry Canada*, University of London, UK, 2007, http://www.ic.gc.ca/epic/site/ippd-dppi.nsf/en/h_ip01456e.html. For music sales in Canada for 2007, see IFPI Market Research, "Music Market Data 2007," February 2008, http://www.ifpi.org/content/library/MUSIC-MARKET-DATA-2007.pdf.

similar to those found in the US law are commonly called DMCA-style laws, in reference to the *Digital Millennium Copyright Act*, which amended the *U.S. Copyright Act* in 1998 in order to ratify the WIPO Internet treaties.

Like Bill C-60, Bill C-61 aims to implement the short-term recommendations outlined in the 2004 *Status Report on Copyright Reform*; however, Bill C-61 is more complex than C-60 in certain respects. Amendments to the private copying regime were excluded from Bill C-61 and the government indicated that this would be examined in the autumn of 2008 instead.

DESCRIPTION AND ANALYSIS

The following section provides a summary overview of selected provisions contained within the clauses of the bill.

A. First Distribution Right (Clause 2)

This clause amends the definition of "copyright" (section 3(1)), which lists a series of acts exclusive to the copyright holder. The new definition also includes, in the case of "a work that can be put into circulation as a tangible object," the right to the first sale or first transfer of ownership of the tangible object embodying the work. Thus, copyright holders have the right to initially distribute their works or to authorize their first distribution in tangible form.

B. Repeal of Provisions Regarding Photographs (Clauses 4 and 5)

These clauses repeal provisions that created a special regime for photographs and commissioned works. This regime change will be discussed below (see sections P and X).

C. Performer's Copyright in a Performance (Clause 7)

This clause amends section 15, which lists a series of acts exclusive to a performer in association with his or her performance. Clause 7 extends the performer's copyright in a performance to include, if the performance is "not fixed," the right to communicate it to the public by telecommunication, to perform it in public, and to fix it in any material form.

In the case of a performance that is "fixed in a sound recording," copyright is extended to include the rights to reproduce the sound recording, to rent it out, to communicate it to the public in a way that allows the public to access it on demand, and to sell or otherwise transfer ownership of every sound recording of the performance that the performer has never previously authorized for circulation.

D. Moral Rights in a Performer's Performance (Clause 8)

This clause, which creates new sections 17.1 and 17.2, specifically extends the moral rights regime of the Act to a performer's live performance or performance fixed in a sound recording as long as the performance meets one of the conditions set out in clause 7 and therefore receives copyright protection.

E. Sound Recording Makers' Copyright in a Sound Recording (Clause 9)

In keeping with the present regime granting performers and sound recording makers parallel rights in relation to the sound recording of a performance (see section 19, amended by clause 10 below), this clause (adding new section 18(1.1) and amending sections 18(2) and (3)) grants to sound recording makers rights analogous to those of a performer (as stipulated in clause 7).

F. Right to Remuneration for Performers and Sound Recording Makers (Clause 10)

Section 19(1) states that when a sound recording is published, both the performer and maker of the sound recording are entitled to equitable remuneration for its performance or communication in public except when the performance is retransmitted. Clause 10 amends section 19(1) to add a new exception to this right to remuneration in cases where the sound recording or the performance is made available to members of the public on demand (i.e., available on the Internet).

The term of this right to remuneration of performers and sound recording makers is equal to that of the copyright in a performance or sound recordings (as per clause 12 below).

G. Term of Copyright in a Performer's Performance, a Sound Recording or a Communication Signal (Clause 12)

This clause amends section 23, which sets out the term of copyright with regards to a performer's performance and a sound recording (presently 50 years following the end of the calendar year in which the performance or sound recording was first made) and extends the term as follows.

With regards to a performer's rights in a performance, if the performance is fixed in a sound recording before the end of the term of copyright in the performance, the copyright in the performance shall continue for 50 years following the end of the calendar year in which the recording was made. If the sound recording in which the performance is fixed is then published before the end of the term of copyright in the performance, copyright in the performance shall continue for 50 years following the end of the calendar year in which the sound recording was first published, but shall not extend beyond 99 years following the end of the calendar year in which the performance occurred in the first place.

With regards to a sound recording maker's rights in a sound recording, if the sound recording is published before the expiry of the copyright term in the first fixation of the sound recording, the copyright term will subsist for 50 years following the end of the calendar year in which the first fixation occurred.

H. Secondary Infringement Relating to a Lesson (Clause 14)

This clause amends section 27 (which outlines the acts considered to be infringements to copyright) by extending the definition of "infringement" to acts with respect to "lessons" (defined below at clause 18).

I. Infringement of Moral Rights (Clause 15)

This clause amends section 28.1 to extend the definition of infringement of a moral right to include acts contrary to the moral rights of a performer in a performance.

J. Right to the Integrity of a Work – Performers' Moral Rights (Clause 16)

This clause amends section 28.2(1) to extend the right to preserve the integrity of a work to a performer with respect to a performance.

K. Reproduction of a Work Onto Another Medium or Device (format shifting) and Recording Programs for Later Listening or Viewing (time shifting) (Clause 17)

1. Reproduction of a Work Onto Another Medium or Device (format shifting)

New sections 29.21 and 29.22 allow individuals to reproduce a work (or a performance) contained in one medium onto another medium or device under the following conditions:

- the originating copy of the work from which the reproduction is made is not an infringing copy;
- the individual did not borrow or rent the originating copy of the work;
- the individual did not circumvent any technological measure in order to copy the work;
- the individual reproduces the work only once for each device the individual owns or, if the work is in digital form, prints no more than one copy;
- the individual does not give the reproduction away; and
- the reproduction is used only for private purposes.

This format shifting right does not apply to:

- cases where the individual intends to distribute, sell, communicate to the public or otherwise transfer the copy to a third party when she or he reproduces the work;
- programs communicated over the Internet, unless they are simultaneously broadcast on television and/or radio; and
- reproductions of works made for private use and regulated by Part VIII of the Act, which sets out the private copying regime.

2. Recording Programs for Later Listening or Viewing (time shifting)

According to new section 29.23, it is not an infringement for an individual to record a program in order to watch or listen to it later if the individual:

- receives the program legally;
- does not circumvent technological measures to record the program;

- makes no more than one copy of the program;
- keeps the recording no longer than necessary in order to enjoy the recording at a more convenient time;
- does not give the recording away; and
- uses the recording for private purposes.

This right of reproduction does not apply in cases where the individual recorded the program with the intent of selling or renting it, distributing it, communicating it to the public by telecommunication or performing it in public.

L. Fair Dealing Provisions for Educational Institutions (Clause 18)

This clause creates new sections 30.01 to 30.04, which provide special exceptions for educational institutions and people working under their authority (students, teachers, etc.), allowing them to include copyrighted works in a lesson without such an act constituting infringement of copyright. A "lesson" is defined as a test, exam or lesson or part of one in which one reproduces, telecommunicates or does any other act that could otherwise be considered an infringement of a copyright (for example, including a poem in an English literature exam).

1. Exceptions to Infringement When Using a Work in the Context of a Lesson (new Section 30.01)

This new provision specifically provides that it is not an infringement for an educational institution to:

- communicate a lesson to the public by telecommunication for educational or training purposes so long as the public consists only of students enrolled in the course or other people acting under the authority of the educational institution;
- make a fixation of the lesson; or
- do any other act necessary for the purpose of the acts described above.

This new fair dealing exception is subject to certain conditions. The educational institution (or person acting under its authority) must:

- take measures that can reasonably be expected to limit communication of the lesson to the targeted public;

- take measures that can reasonably be expected to protect the work from being further communicated, fixed or reproduced, including technological measures to protect a work in a digital form; and

- destroy the fixation of the lesson within 30 days of the day when the students enrolled in the course have ended their final examinations.

2. Where the Educational Institution Has an Agreement With a Collective Society (new Section 30.02)

Where an educational institution has a reprographic reproduction licence with a collective society,[4] the following acts with respect to works in the collective society's repertoire will not constitute infringement so long as they are for educational or training purposes:

- making a digital copy of a paper version of a work;

- communicating a digital copy of a work by telecommunication; or

- doing any other act necessary for the purpose of the acts described above.

The following additional conditions apply to the making of digital copies of a work by an educational institution in cases where the institution is bound by a reprographic reproduction licence:

- persons under the authority of the educational institution may print only one copy of works communicated to them in digital form;

- the educational institution shall pay royalties based on the existing reprographic agreement to the collective society with respect to all persons to whom a digital copy of the work is communicated and shall otherwise comply with the terms of its agreement; and

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(4) A "collective society" is defined at section 2 of the Act as:

> a society, association or corporation that carries on the business of collective administration of copyright or of the remuneration right conferred by section 19 or 81 for the benefit of those who, by assignment, grant of licence, appointment of it as their agent or otherwise, authorize it to act on their behalf in relation to that collective administration, and
>
> (*a*) operates a licensing scheme, applicable in relation to a repertoire of works, performer's performances, sound recordings or communication signals of more than one author, performer, sound recording maker or broadcaster, pursuant to which the society, association or corporation sets out classes of uses that it agrees to authorize under this Act, and the royalties and terms and conditions on which it agrees to authorize those classes of uses, or
>
> (*b*) carries on the business of collecting and distributing royalties or levies payable pursuant to this Act.

- the educational institution shall take measures to prevent the work from being communicated to persons not acting under its authority and to prevent the work from being further communicated or printed more than once.

New section 30.02(7) sets out the damages recoverable by a copyright owner in proceedings against an educational institution for making or communicating a digital reproduction of a paper work.

Students or others under the authority of an educational institution are exempted from liability if they print one copy of a work that was communicated to them in digital form by the educational institution and if, at the time of printing, it was reasonable for them to believe the communication was made in accordance with this regime (new section 30.02(8)).

3. Royalties (new Section 30.03)

This new section sets out the amounts payable by or refundable to an educational institution that has already paid royalties to a collective society for a digital reproduction but that subsequently enters into a digital reproduction agreement with a collective society and said agreement sets a different royalty fee. The same procedure will apply in the event a tariff is certified for the digital reproduction of works.

4. Works Available Through the Internet

New section 30.04 creates an exemption from infringement for an educational institution or a person acting under its authority that reproduces, communicates or performs to a public consisting primarily of students or other persons acting under the educational institution's authority, a work available on the Internet.

This exemption does not apply if:

- the educational institution does not mention the source of the work, and if given in the source, the name of the author, the performer, the maker of the sound recording and/or the broadcaster;

- access to the work or the Internet site where the work is posted is restricted by a technological measure or if there is a clearly visible notice on the work itself or on the Internet site prohibiting that particular use (the Governor in Council may make regulations prescribing what constitutes a "clearly visible notice"); and

- the educational institution knows or should know that the work was made available on the Internet without the copyright owner's consent.

M. Reproduction of Works When a Format Is Becoming Obsolete (Clause 19)

This clause reformulates section 30.1(1)(*c*) of the Act to allow a library, archive or museum or a person acting under the authority of one of these institutions to copy a work in an alternative format if the current format of the work is becoming obsolete. This clause is very useful to these institutions, as under the present Act, such copying is only permitted once the format is obsolete.

N. Reproductions for Patrons of Other Libraries, Archives or Museums (Clause 20)

This clause permits libraries, archives and museums to perform for patrons of other such institutions any of the acts the Act already allows them to perform for their own patrons (new section 30.2(5.01).

Moreover, under this new section, a library, archive or museum may now provide a patron of another such institution with a digital copy of a paper work under the condition that it take measures to prevent the patron from:

- making any further reproduction of the work, save printing one copy;
- communicating the digital copy to another person; and
- having access to the digital copy for more than five days.

The Governor in Council may prescribe the manner and form in which the measures referred to above are to be taken (section 30.2(6)(*e*)).

O. Network Service Providers (Clause 21)

New section 31.1 exempts from copyright infringement certain activities of network service providers (i.e., Internet and intranet service providers) involving works communicated on their networks. This exemption is subject to the certain conditions:

- the work must not be modified by the network service provider;

- the network service provider must allow for automated reading and control of cached material by whoever made the work available on the network; and

- the network service provider must not interfere with technology used to monitor the use of works on the network.

P. Permitted Use (Clause 22)

According to new section 32.2(1)(*f*) created by this clause, an individual who commissions a photograph or portrait may use the photograph or portrait for personal and non-commercial use. This exemption may be voided by way of a contract between the commissioner and the photographer or artist.

Q. Grandfathering Provision to Preserve the Economic Value of Existing Rights and Interests in Performers' Performances and Sound Recordings (Clause 23)

New section 32.6 provides a grace period of two years (from the date this section comes into force) before the value of existing rights and interests in performers' performances and sound recordings may be varied by the new economic and moral rights created by new sections 15(1.1), 17.1(1) and 18(1.1). Thus, rights protected by existing provisions of the Act as found in existing contracts are valid for a period of two years after this section comes into force. After that time agreements and contracts related to the new rights found in new sections 15(1.1), 17.1(1) and 18(1.1) may affect the value of existing rights owned by publishers or other parties.

R. Grandfathering Provision to Preserve the Economic Value of Existing Rights and Interests Held by a Person in a Treaty Country (Clause 24)

This clause is similar to clause 23, except that it preserves the economic value of rights held by individuals in treaty countries, other than a WCT country (section 33). To be preserved in this way, the right must have been held before 1 January 1996 or before the date the country became a treaty country (whichever is later).

S. Grandfathering Provision to Preserve the Economic Value of Existing First Sale Rights and Other Rights Held by a Person in a Country That Recently Joined the WCT (Clause 25)

This clause (new sections 33.1 and 33.2) is similar to clause 24, except that it refers to rights related to the first sale of a work in tangible form, a new right found in new section 3(1)(*j*), in a country before it became a WCT country.

T. Statutory Damages Limitation for Private-use Infringements (Clause 30)

This clause creates a new limitation on statutory damages applicable to infringement proceedings involving private use of a copyrighted work.

Under the existing Act (section 38.1(1)), a copyright owner may make an election before a final judgment is rendered in order to recover statutory damages instead of damages and profits, for all infringements of one work by an infringer or group of infringers for a sum between $500 and $20,000.

New sections 38.1(1.1) to (1.4) create a new $500 limitation on statutory damages for all private-use infringements by a defendant involving one work. This limitation is not available for private-use infringements that occurred before the infringement proceedings or that are not involved in the current proceedings. Moreover, this limitation cannot be “doubled-up” and used by more than one copyright owner against the same defendant for private-use infringements that occurred before the election was made. This $500 limitation on statutory damages does not apply if the defendant circumvented a technological measure.

Unlike in the case of general elections governed by section 38.1(1), the $500 amount may not be reduced to an amount between $200 and $500, even if the defendant is unaware of the infringement.

U. Technological Measures and Rights Management Information (Clause 31)

This clause forms the bulk of additional remedies granted to copyright holders in cases of circumvention of technological measures used to protect works or alteration or removal of rights management information.

1. Technological Measure (Section 41 and new Sections 41.1 to 41.2)

Section 41 introduces two new definitions.

“Technological measure” is broadly defined to include measures used to both control access and restrict use of a work. Overall, technological measures consist of digital locks that prevent access and copying; however, the technological measure must be effective and ordinarily used for protection during its operation to be included under these new anti-circumvention provisions.

“Circumvent” is also broadly defined and includes descrambling, decrypting, avoiding, bypassing, removing, deactivating or impairing the technological measure used to control access to or use of the work.

Under new section 41.1, the following activities involving circumvention and technological measures are prohibited:

- circumventing a technological measure;
- offering services or devices to the public if:
  - the primary purpose of the service or device is to circumvent a technological measure;
  - the services or devices are only commercially viable when the services or devices are used to circumvent a technological measure; or
  - the services or devices are marketed for the purpose of circumventing a technological measure.

This clause also contains an extensive list of circumstances where circumvention of a technological measure or the offering of services or devices is permitted. These circumstances include the following:

- investigations to enforce any Act of Parliament, any Act of a provincial legislature, or investigations related to the protection of national security (new section 41.11);
- ensuring the interoperability of purchased or licensed computer programs (new section 41.12);
- encryption research, if the person has lawfully obtained the work and has informed the copyright owner (new section 41.13);
- preventing the collection of personal information by a third party during the use of the work and ascertaining whether such information has been collected (new section 41.14);
- assessing or correcting any security flaws in a computer or network (new section 41.15);

- the transformation of a work by an individual or a non-profit organization into a perceptible form for the use by persons with perceptual disabilities (new section 41.16); or

- the temporary recording of television shows and format shifting of sound recordings and performers' performances by television stations unless the copyright owner provides the means to unlock the technological measure in a timely manner (new section 41.17).

Remedies against libraries, archives and museums for circumvention of a technological measure may be limited to an injunction if these entities demonstrate that they did not know they were circumventing or that they had no reasonable grounds to believe they were circumventing a technological measure.

New section 41.2 states that the Governor in Council may make regulations to ban a technological measure if it unduly restricts competition in the aftermarket sector. It may also list additional circumstances where circumvention is permitted if certain factors require it. The Governor in Council may also make regulations that require a copyright owner to provide access to a work to certain persons who would otherwise be permitted access under the Act.

2. Rights Management Information (new Section 41.21)

This new section defines "rights management information" as information attached to a work that identifies the holder of any rights in the work, and it prohibits knowingly removing or altering that information if the person knows or should have known that its removal or alteration would facilitate or conceal any infringement of the copyright or adversely affect the owner's right to remuneration.

This general prohibition includes penalties similar to those available for other infringements and also applies to subsequent uses of works with stripped or altered rights management information.

3. Providers of Network Services and Information Location Tools (new Sections 41.25 to 41.27)

The last part of clause 31 concerns the notice-and-notice regime for claimed infringement occurring on the Internet. Three types of individuals are affected by this regime:

- internet service providers;

- persons that store webpages or websites in digital memory (web hosting); and

- information location tools providers (i.e., search engines operators).

Briefly, a person listed above is obligated to send a notice to the potential infringer after receiving a notice of claimed infringement from the alleged copyright owner. Upon receipt of the notice, the service provider must also retain information identifying the alleged infringer for at least six months and up to one year in cases where infringement proceedings have been instituted.

Under certain conditions, remedies against persons that operate search engines are limited to an injunction (new section 41.27). This exemption does not apply to Internet service providers or web hosting services.

V. Penalties for Circumvention and Limitations for Libraries, Archives, Museums and Educational Institutions (Clause 32)

This clause establishes the maximum penalties for circumvention of a technological measure directly or indirectly through the provision of circumvention services or devices to the public. Conviction on an indictable offence can result in a maximum fine of $1,000,000 and/or imprisonment for up to five years. A summary conviction can result in a maximum fine of $25,000 and/or imprisonment for up to six months. Individuals acting on behalf of a library, archive, museum or educational institution are exempted from these penalties.

W. Regulation-making Power of Governor in Council (Clause 34)

This clause grants the Governor in Council the power to create regulations specifying the measures that an educational institution must take when delivering lessons to students through the Internet and when making digital copies of a work.

This clause also grants the Governor in Council the power to prescribe the procedure for the notice-and-notice regime applicable to Internet service providers, web hosting businesses and search engines operators.

X. Transitional Provisions to Prevent the Resurrection of Copyright in Works Where the Copyright Term Has Expired and to Grandfather Existing Commissioned Works (Clauses 38 to 40)

These clauses ensure that copyright that has expired in photographs is not revived by provisions in the bill. They also grandfather corporations and individuals that were deemed to be authors of photographs under the old provisions so that these persons will continue to hold copyright in those photographs. Other commissioned works are also grandfathered, and copyright in these works will continue to be held by the commissioner unless modified by contract.

COMMENTARY

A. Initial Public Reaction

The initial media response to Bill C-61 focussed on penalties for unlocking or circumventing technologically protected digital works and the new limitation on statutory damages for the private use of copyrighted works. More recent articles shifted to privacy concerns related to anti-circumvention provisions and the perceived creation of a police state for their enforcement. The complexity of the bill may be a factor in media response being limited to the easy-to-understand new penalties and their possible enforcement. A recent Angus Reid survey also focussed on the new penalties for the private use of copyrighted works and for circumvention and found Canadians sitting on the fence on their approval of the bill.(5) Most copyright law practitioners have said little about the proposed legislation.(6)

B. Issues

Since this bill has not yet been examined at committee stage, the remainder of this commentary will focus on general issues associated with copyright law and the creation of new legal remedies for circumvention of a technological measure. Canadian-specific issues related to fair dealing, privacy and potential constitutional problems will also be examined. Lastly, concerns voiced by academics, stakeholders and rights holders regarding innovation, piracy and business models will be summarized.

1. Fair Dealing

Some people fear that the anti-circumvention provisions proposed in Bill C-61 (new section 41.1) could limit legitimate uses currently permitted by the Act's fair dealing exemptions or that they could even effectively abrogate them.(7) The Business Coalition for

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(5) Angus Reid Strategies, "Angus Reid Poll: Canadians Evenly Split on Proposed Amendments to Copyright Act," 19 June 2008, http://www.angusreidstrategies.com/index.cfm?fuseaction=news&newsid=245&page=2; and see the full poll results at: http://angusreidstrategies.com/uploads/pages/pdfs/2008.06.19_Copyright.pdf.

(6) See J. Allen, "All Quiet on the Law Firm Front," *The Globe and Mail*, 2 July 2008.

(7) J. deBeer, "Canada's new copyright bill: More spin than 'win-win,'" *National Post*, 16 June 2008, http://www.nationalpost.com/news/story.html?id=590280; I.R. Kerr, "If Left to Their Own Devices…: How DRM and Anti-circumvention Laws Can Be Used to Hack Privacy," in *In the Public Interest: The Future of Canadian Copyright Law*, ed. M. Geist, Irwin Law, Toronto, 2005, pp. 167–210 (p. 205), http://www.irwinlaw.com/PublicInterest/Two_03_kerr.pdf; P. Petrick, "Why DRM Should be Cause for Concern: An Economic and Legal Analysis of the Effect of Digital Technology on the Music Industry," Berkman Center for Internet and Society at Harvard Law School, Research Publication No. 2004-09, November 2004, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=618065#PaperDownload.

Balanced Copyright, whose members include Google, Yahoo!, Rogers and Telus, has publicly announced it is looking forward to the committee process in order to argue for an exception to allow circumvention of technological measures for personal use, which, in their view, "would go a long way to striking a balance."(8) Some have argued that fair dealing should be the same in both the analogue and digital spheres.(9)

Indeed, current fair dealing exemptions may not apply to circumvention of technological measures, even for purposes of private study, research or private copying because circumvention of technological measures is not expressly considered an infringement of copyright.(10) For this reason, these provisions could be perceived as protecting the technological measures themselves or the copyright holder's business model rather than copyright in the work.(11)

For these reasons, interest groups are divided with respect to the anti-circumvention provisions. The Canadian Music Creators' Coalition, which assembles a number of music creators from across Canada, has said that Bill C-60 helped the record labels, not the creators, and that consumers should be able to transfer and share music under fair dealing principles, so long as it is not for commercial purposes. It has reiterated similar views with respect to Bill C-61 and has requested consultations on this bill.(12)

Professor Michael Geist, who has written extensively on copyright and technology law, believes Bill C-61's new provisions pertaining to technological measures can serve to essentially eviscerate fair dealing rights and dramatically reduce the public domain.(13)

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(8) S. Doyle, "Copyright lobby hunkering down, studying Bill C-61, and building alliances," *The Hill Times*, 23 June 2008, http://www.thehilltimes.ca/html/cover_index.php?display=story&full_path=/2008/june/23/lobbying/&c=1.

(9) T.K. Armstrong, "Digital Rights Management and the Process of Fair Use," *Harvard Journal of Law and Technology*, Vol. 20, Fall 2006, p. 49.

(10) Association of Universities and Colleges of Canada, "Proposed copyright law amendments: some very good changes but some cause for concern," 13 June 2008, http://www.aucc.ca/publications/media/2008/copyright_06_13_e.html.

(11) M. Geist, "Looking at the Future of Canadian Copyright in the Rear View Mirror," *Lex Electonica*, Vol. 10, Winter 2006, p. 6, http://www.lex-electronica.org/articles/v10-3/geist.pdf; and G. Vona, "The Anti-Circumvention of Technological Protection Measures: Whether Bill C-60 Would Be in Compliance With International Intellectual Property Treaty Obligations," *Information and Technology Law*, Vol. 10, September 2006, pp. 5–11 (p. 9).

(12) Canadian Music Creators Coalition, "A New Voice: Policy Positions of the Canadian Music Creators Coalition," 26 April 2006, http://www.musiccreators.ca/docs/A_New_Voice-Policy_Paper.pdf; and "CMCC: Copyright Reform Bill Doesn't Help Canadian Artists," 12 June 2008, http://www.musiccreators.ca/wp/?p=264.

(13) M. Geist (Winter 2006), p. 6.

2. Privacy

Canada's Privacy Community, a group of associations and individuals advocating privacy protection, has warned against enacting legislation that protects technological measures and rights management information which could be used by corporations to monitor users' actions and choices.(14) One author writes that such monitoring may inhibit expressive rights relating to receiving and imparting information and certainly raises privacy concerns.(15) From the point of view of individuals' privacy rights, legislation protecting technological measures and rights management information should be balanced with provisions protecting individuals from excessive monitoring or surveillance and from being forced into agreeing to such surveillance through contractual obligations.(16) This lack of protection for users' personal information was a fierce criticism of Bill C-60. Similar concerns over privacy issues are being expressed in the media today in response to Bill C-61.

3. Constitutional Issues

Some have questioned whether Parliament has the constitutional authority to enact laws regarding rights management information and technological measures to protect works, since it is thought that anti-circumvention legislation and controlling access to a work are matters of protecting property and also implicate issues pertaining to contractual obligations, consumer protection and e-commerce – all of which are within provincial jurisdiction – rather than matters relating to copyright.(17)

The wide use of technological measures or rights management information could also have an impact on Canadians' freedom of expression rights.(18) This could lead to *Canadian Charter of Rights and Freedoms* challenges of the provisions if they result in restrictions on

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(14) Canada's Privacy Community, "Background Paper: Critical Privacy Issues in Canadian Copyright Reform," 17 May 2006, http://www.intellectualprivacy.ca/documents/background_paper.pdf.

(15) J. Bailey, "Deflating the Michelin Man: Protecting Users' Rights in the Canadian Copyright Reform Process," in *In the Public Interest: The Future of Canadian Copyright Law*, ed. M. Geist, Irwin Law, Toronto, 2005, pp. 125–166 (p. 159), http://www.irwinlaw.com/PublicInterest/Two_02_Bailey.pdf.

(16) Kerr (2005), pp. 170, 175.

(17) J.F. deBeer, "Constitutional Jurisdiction Over Paracopyright Laws," in *In the Public Interest: The Future of Canadian Copyright Law*, ed. M. Geist, Irwin Law, Toronto, 2005, pp. 89–124, http://www.irwinlaw.com/PublicInterest/Two_01_deBeer.pdf; Vona (September 2006), pp. 9–10.

(18) For a summary of freedom of expression and copyright law, see D. Fewer, "The Constitutionalizing Copyright: Freedom of Expression and the Limits of Copyright in Canada," *University of Toronto Faculty of Law Review*, Vol. 55, No. 2, 1997, p. 175.

freedom of expression.(19) Without fair dealing provisions allowing them to circumvent technological measures, researchers and journalists will have a more difficult time accessing, researching and reporting on works. The Canadian Newspaper Association has recommended that an exception to the anti-circumvention provisions be created for investigative journalism.(20) These provisions may also violate access to information rights, as they render the distribution of circumvention software or programs illegitimate.(21)

4. Technological Measures, Innovation, Piracy and Business Models

Some individuals believe that technological measures are used to maintain existing and out-dated business models first created for non-digital works.(22) Paradoxically, a number of analysts have shown that stronger copyright protection does not increase the monetary value of copyrighted works.(23)

Some commentators believe that the use of technological measures to restrict the use of information and to extend the copyright term could prohibit the creation of new technologies and works. This is due to information being "locked" and the indefinite term of protection. Jennifer Jenkins, an attorney and director of Duke University's Center for Studies on the Public Domain wonders how stringent copyright provisions will affect creativity and

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(19) On this subject, J. Bailey states, "[d]eepening the [Copyright] Act's restrictions on freedom of expression through anti-circumvention provisions can only serve to heighten constitutional concerns," in Bailey (2005), p. 166.

(20) Canadian Newspaper Association, "The Impact on Newspapers of Bill C-61, an Act to amend the Copyright Act," 20 June 2008, http://www.cna-acj.ca/en/news/public-affairs/the-impact-newspapers-bill-c-61-act-amend-copyright-act.

(21) P. Morin, "Les Mesures techniques de protection du droit d'auteur : aperçus des conséquences possibles en droit canadien : atteinte à la liberté d'expression – Partie II," *Les Cahiers de propriété intellectuelle*, Vol. 18, January 2006, pp. 97–140.

(22) R. Fleischer, "The Future of Copyright," CATO Unbound, 9 June 2008, http://www.cato-unbound.org/2008/06/09/rasmus-fleischer/the-future-of-copyright/.

(23) For a summary of the economic reasons for copyright, see W.M. Landes and R.A. Posner, "An Economic Analysis of Copyright Law," *Journal of Legal Studies*, Vol. 18, June 1989, p. 325, http://www.jstor.org/sici?sici=0047-2530(198906)18%3c325%3AEAOCL%3E2.0.co%3B2-08cookieset=1; S.G. Breyer, "The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs," *Harvard Law Review*, Vol. 84, December 1970, p. 281, http://www.jstor.org/sici?sici=0017-811X(197012)84%3A2%3C281%3ATUCFCA%3E2.0.co%3B2-%23; G.A. Akerlof et al., *The Copyright Term Extension Act of 1988: An Economic Analysis*, AEI-Brookings Joint Center for Regulatory Studies, Brief 02-1, May 2002, http://www.brookings.edu/reports/2002/05_copyright_litan.aspx.

innovation since one cannot create in a vacuum, without reference to other works.(24) The Appropriation Art Coalition, a group of contemporary artists, also criticizes the new bill as potentially limiting the future creation of any kind of appropriation art.(25)

Some artists' groups, however, do not want new exceptions to the law, welcoming stronger protection of their works and contending that existing exemptions allow equitable use of contending works. The Creators Copyright Coalition has voiced concern over not being compensated for the use of copyrighted works and welcomes implementation of the WIPO Internet treaties and the protection of technological measures for performers' performances.(26) The Entertainment Software Association of Canada, which previously voiced concern over commercial trade in devices used to circumvent technological measures, is supportive of Bill C-61.(27)

The International Federation of the Phonographic Industry (IFPI) has expressed concern over the weak state of Canada's copyright laws and the need to protect Canadian artists from lost revenue due to Internet piracy.(28) IFPI argues that stronger copyright protection will result in increased legal downloads of copyrighted music.(29)

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(24) A. Brunet, "Protégé par le droit d'auteur…," *La Presse*, 17 October 2006.

(25) G.M. Dault, "Permissions, ungranted," *The Globe and Mail*, 12 July 2008, p. R13.

(26) Creators Copyright Coalition, "Platform on the Revision of Copyright," January 2008, http://www.pwac.ca/files/PDF/CopyColPlatform%20.pdf.

(27) J. Sturgeon, "Proposed Copyright Changes Lauded," *Financial Post*, 13 June 2008, Entertainment Software Association of Canada, "Government Affairs: Federal Issues," http://www.theesa.ca/gov-federal.html.

(28) J. Kennedy, "Canada – a land of lost opportunity?" Speech on behalf of IFPI at Canada Music Week, March 2008, http://www.ifpi.org/content/section_views/view018.html; D. Sabbagh, "Music sales fall to their lowest level in over twenty years," *Timesonline*, 18 June 2008, http://business.timesonline.co.uk/tol/business/industry_sectors/media/article4160553.ece.

(29) IFPI Market Research (February 2008).