



# **CANADIAN COPYRIGHT LAW:**

## **A Consumer White Paper**

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# Executive Summary

## Introduction

We are a coalition of consumer advocates. We have come together to advocate for copyright laws that serve the interests of Canada and of Canadians.

Copyright law is designed to balance the interests of creators with the interests of the public. Copyright grants creators exclusive rights in their works as a reward for creativity that also serves as an incentive for the creation of new works. These rights are not absolute, but limited in nature, scope and time. These limits are essential to copyright's greater design, for it is at the limits of copyright owners' rights that important consumer interests come into play.

From a consumer's perspective, copyright's current balance is far from perfect. In fact, many consumer dealings with copyrighted content – ordinary dealings, like copying digital music onto a portable device, or using the digital video recorders sold by cable companies – technically infringe copyright. In these and many other cases, the law is simply out of step with reality. Simple, uncontroversial amendments to the *Copyright Act* can fix many of these failings.

Unfortunately, copyright policy makers are not focusing on consumer interests. Instead, recent proposals to amend the *Copyright Act* focus on expanding rights holder's interests at Canadian consumer's expense. We call on Canada's law-makers to accommodate consumer interests in any revision to the *Copyright Act* currently under consideration. Additionally, we call on law-makers to revise the *Copyright Act* to address important consumer concerns that are not yet under consideration at all.

## Anti-Circumvention Laws

Canadian lawmaker's push to bring Canada into line with the WIPO Internet Treaties could have very serious consequences for Canadian consumers. We believe that there is no reason to add anti-circumvention protection to Canadian copyright law. We believe this for several reasons:

1. **No justification.** The case had not been made that Canada needs anti-circumvention legislation. In fact, Canadian cultural industries are flourishing in the absence of anti-circumvention legislation.
2. **Redundant.** Anti-circumvention legislation is redundant: copyright law already provides penalties for copyright infringement and there is no need for a second layer of protection that penalizes substantially the same behaviour as copyright;
3. **DRM does not work.** Technological tools like DRM do not work. Corporations invest millions of dollars into developing DRM systems that are broken within hours or days of being released.
4. **Technological threats.** Anti-circumvention laws do not improve on copyright law's existing disincentives to infringe copyright. Anti-circumvention laws do, however,

threaten other values that are important to consumers, such as competitive markets, privacy, and security. The U.S. anti-circumvention law (known as the DMCA) serves as a stark example of this and is a failure.

5. **Anti-circumvention laws are government intervention.** Our markets don't need government intervention. Government should instead take a neutral stance, working to ensure a level competitive playing field that benefits consumers rather than privileging particular business models.

If Canadian lawmakers choose to legislate anti-circumvention laws, they must take great care to minimize the negative impact those laws will have on Canadians. We believe that any Canadian anti-circumvention law must respect the following conditions:

1. **No new “access” right.** Laws should tie circumvention liability to an intent to infringe copyright; Canadians should not be liable for accessing content and should enjoy an unfettered right to do so.
2. **Non-infringing circumvention.** Consumers should be allowed to circumvent technological measures, like DRM, providing that their access to the underlying content does not infringe copyright.
3. **Legal tools, devices and services.** Anti-circumvention legislation should not prevent people from developing, selling and using tools, devices and services for circumventing technological measures for legal reasons.
4. **Protect legitimate expectations.** Laws should preserve rights and expectations that consumers have under copyright, such as the right to make copies and backups of works that they own.
5. **Protect privacy.** Anti-circumvention laws should not protect technologies that do not respect privacy rights. Consumers should retain the right to enjoy works privately and access to content must not be conditional on the surrender of consumer privacy.
6. **Do not protect spyware.** Removing unwanted and illegal technology such as spyware should not be a violation of anti-circumvention laws.
7. **Protect the public domain.** It should always be legal to circumvent DRM in order to access works that are no longer protected by copyright and exist in the public domain.
8. **Prohibit misuse.** Any Canadian anti-circumvention law should be balanced by the creation of specific competitive protections for Canadians and the creation of liability for “copyright misuse.”

## Copyright Reform

In addition to the threat posed by anti-circumvention laws, here are many facets of copyright law that run counter to the interests of Canadian consumers and do not reflect the realities of the Canadian marketplace. Canada needs to bring current copyright law into step with the ways consumers use copyrighted materials. Here are our recommendations:

1. **Clarify the legality of time, space, and format shifting.** Copyright laws that outlaw these practices threaten consumers and are out of step with today's marketplace and with reasonable consumer practices.
2. **Fix fair dealing.** Expand fair dealing rights to include other uses of content like parody, digital sampling and other transformative uses. Subsume the requirement to provide the source and author when a work is used for purposes of criticism, review, or news summary into the general fairness analysis.
3. **Legalize back-ups.** Protect consumers' right to protect their investments by making back-up copies of legal, purchased content.
4. **Protect the public domain.** Reduce copyright terms, or keep them to the minimum needed to meet Canada's international obligations.
5. **Rationalize statutory damages.** Require plaintiffs to prove damages against consumers, public institutions, museums, libraries, archives, schools, colleges and universities. Restrict the application of statutory damages to cases of commercial infringement, where they are warranted and actually serve the public interest.
6. **Abolish crown copyright.** The public should enjoy free and unrestricted access to works produced with public funds.
7. **Consumer commissioned photographs.** Copyright ownership of commissioned photographs should stay in consumers' hands. Doing otherwise frustrates consumers' legitimate expectations.
8. **Protect copyright and consumers against unfair terms.** Restrict rights holders' ability to undermine copyright's public policy objectives through the use of contractual terms that limit consumers' rights, including the ability to undertake security, interoperability and reverse engineering research, to make reasonable use of content (time-shifting, space-shifting), to make private copies for personal use, and to re-sell content.
9. **Preserve consumers' digital rights.** The *Copyright Act* affords rights-holders only limited rights. It has never been an infringement of copyright law for a consumer to simply read a book, or to listen to music in the privacy of one's own home. By the same token, ephemeral electronic copies, or "RAM copies", should be treated the same way.

10. **Monetize P2P.** Efforts to shut down peer to peer networks have failed. We should find ways to transform P2P networks into legitimate music distribution and compensation vehicles to benefit Canadian music creators and their fans. It is time the Canadian government showed some leadership and undertook active study of this option.

## Conclusion

We are concerned that proposals to change Canada's copyright laws do not represent the interests of Canadian consumers. These proposed changes remove many rights that consumers have traditionally enjoyed and fail to address obvious changes that would benefit consumers and creators. We are advocating on behalf of consumers for laws that do three things:

1. **Do No Harm.** Changes to Canada's copyright laws must be guided by this principle. We must not enact changes that harm consumer welfare and threaten education, freedom of expression, privacy and security. We do not want laws that harm small business, stifle innovation, or that cost Canadians millions of dollars.
2. **Laws Based on Reality, Not Rhetoric.** The Canadian government must consult experts on education, security, privacy, small business, and consumer groups before enacting legislation. Our copyright laws should be based on the facts, not on rhetoric.
3. **Canadian Law Must Serve Canadians.** Statistics Canada reports that our copyright royalty deficit – the amount of royalties generated by Canadians abroad compared with royalties earned by foreign performers in Canada – has grown dramatically in recent years. For every \$1 earned by Canadian performers outside the country, \$5 flows out of the country. Proposals for longer and stronger copyright will increase the flow of dollars out of Canada, rather than foster Canadian creativity. It is important that we address this trade imbalance and focus on the needs of Canadian creators and consumers rather than the self-interested demands of a limited group of rights holders.

Where changes to copyright laws are needed, Canada must adopt laws that serve Canadian interests first. Pressure from American interests and proposals must be rejected.

# Canadian Copyright Law

## Introduction: How Copyright Affects Consumers

Copyright is designed to balance the interests of creators with the interests of the public. Copyright grants creators exclusive rights in their work as a reward for creativity that also serves as an incentive for the creation of new works. These rights are not absolute, but limited in scope and time. These limits are essential to copyright's greater design, for it is at the limits of copyright owners' rights that important consumer interests come into play.

This balance is far from perfect. In fact, many consumer dealings with copyrighted content – ordinary dealings, like copying your music onto your iPod, or using the digital video recorder that your cable company sold you – technically infringe copyright. In these and many other cases, the law is simply out of step with reality. Simple, uncontroversial amendments to the *Copyright Act* can fix many of these omissions. However, our politicians are not even considering amending the law in this way. Instead, the Canadian government is considering expanding the scope and reach of Canada's copyright laws in ways that disrupt consumers' legitimate interests in their enjoyment of and access to the content that they have purchased.

Canadians deserve reasonable copyright laws that accommodate their legitimate interests. We call on Canada's law-makers to:

- (1) accommodate consumer interests in any revision to the *Copyright Act* currently under consideration; and
- (2) revise the *Copyright Act* to address important consumer concerns that are not yet under consideration at all.

## Part I) Anti-Circumvention Laws Shouldn't Circumvent the Consumer

Canadian lawmakers are considering changing Canadian copyright law to bring them into compliance with the World International Property Organisation (WIPO) Internet treaties. Canadian legislators are under tremendous foreign pressure to ratify these treaties. However, it is far from clear that implementing these treaties are in Canadian consumers' best interests.

The WIPO Internet treaties oblige Canada, among other things, to create legal protections for technological measures, like DRM systems, that protect digital content. These technological tools, and the laws that protect them, have the potential to seriously disadvantage Canadian consumers.

### A) *The Truth About Anti-Circumvention Legislation*

There is no need to add anti-circumvention protection to Canadian copyright law. We say this for several reasons:

- (1) the case had not been made that Canada needs anti-circumvention legislation;

- (2) anti-circumvention legislation is redundant: copyright law already provides penalties for copyright infringement and there is no need for a second layer of protection that penalizes substantially the same behaviour as copyright;
- (3) technological tools like DRM do not work;
- (4) anti-circumvention legislation does not work; and
- (5) our markets don't need government intervention.

### **1. No Case for Anti-Circumvention Laws**

Those seeking to change the law need to show that the marketplace is failing in some way and that a change in the law can correct this problem. Supporters of anti-circumvention laws in Canada have failed to do this. Anti-circumvention laws do nothing to improve the marketplace. In fact, Canadian cultural industries are flourishing in the absence of anti-circumvention legislation.

### **2. Copyright Law Already Penalizes Copyright Infringement**

Copyright law already provides penalties for infringing copyright. If someone circumvents technological measures, and accesses material in a way that infringes copyright, copyright law offers copyright owners a remedy. Groups that want anti-circumvention laws need to demonstrate why they need a second layer of legal protection. They have not done so, and they have not proven that the benefit that they will get from anti-circumvention legislation will outweigh the harm it does to the public.

### **3. DRM Doesn't Work**

Technological measures like DRM systems cannot effectively protect content because they are fundamentally flawed, and circumventing them is trivial. Corporations invest millions of dollars into developing DRM systems that are broken within hours or days of being released.

### **4. Anti-Circumvention Legislation Doesn't Work**

Anti-circumvention laws are justified as an incentive necessary for investment in digital content distribution models and as necessary to combat digital copyright infringement. However, in practice, neither of these claims holds water.

The United States crafted its anti-circumvention laws – the *Digital Millennium Copyright Act*, or DMCA - in 1998. In the decade since enactment, the DMCA has created many problems – anti-competitive abuses, stifling criticism, repressing security research, undermining security, etc. – but it has not encouraged any additional investment in digital distribution models. Anti-circumvention law proponents cannot credibly point to a single market that has emerged *because of* anti-circumvention laws. Canadians enjoy virtually all of the same digital services that Americans enjoy.

Similarly, the DMCA has had no impact on copyright infringement levels. After a decade under the DMCA, infringement of movies over file-sharing networks in the US is at an all-time high. Infringement levels do not significantly differ between Canada and the United States.



We conclude that anti-circumvention laws provide no measurable improvement to copyright's existing incentives to roll out new digital distribution models, and similarly do not improve on copyright law's existing disincentives to infringe. Anti-circumvention laws do, however, threaten other values that are important to consumers, such as competitive markets, privacy, and security – a point that we will return to shortly.

## **5. Our Markets Don't Need Government Intervention**

In imposing anti-circumvention laws on Canadian consumers, the government would intervene directly in the marketplace in favour of certain copyright owners. Anti-circumvention laws protect technology, not content, and in so doing privilege business models that rely on that technology – including those involving technological measures and all of their inherent competitive, security, and privacy risks. Government should instead take a neutral stance, working to ensure a level competitive playing field that benefits consumers rather than privileging particular business models. The copyright system should be neutral, should encourage many channels for bringing content to market, and should discourage the formation of distribution bottlenecks that result in destructive concentrations of ownership.

### ***B) If We Must Have Anti-Circumvention Legislation***

If Canadian lawmakers choose to legislate anti-circumvention laws, they must take great care to minimize the negative impact those laws will have on Canadians. Canada should learn from the mistakes of nations who have already implemented anti-circumvention laws and avoid repeating their mistakes. Any Canadian anti-circumvention law must:

- (1) tie circumvention liability to an intent to infringe copyright;
- (2) allow circumvention of Technological Measures for legal purposes;
- (3) allow the sale of circumvention devices and services;
- (4) preserve rights and expectations that consumers have under copyright law;
- (5) protect consumer privacy;
- (6) discourage illegal activity;
- (7) avoid locking away material that is in the public domain; and
- (8) protect consumers against IP misuse.

#### **1. Liability for Circumvention with Intent to Infringe**

Anti-circumvention laws come in two flavours: those that regulate *access to* content, and those that regulate *dealings with* content. The WIPO Internet Treaties speak to the latter, not the former. Any Canadian anti-circumvention law should do the same: consumers should only be liable for circumventing technological measures when their intent is to infringe copyright.

We say this for three reasons: first, anti-circumvention laws that favour technologies that regulate access to content effectively create a new *access* right that copyright owners do not currently enjoy under the *Copyright Act*.

Second, an *access* right like this seriously tips the balance, inherent in copyright law, towards the interests of copyright owners (not creators), by effectively eviscerating essential rights of users,

consumers, libraries, archives, museums, researchers, educational institutions, and the perceptually disabled. Undermining these user rights undermines copyright itself.

Third, adoption of an *access* right – one that goes beyond the requirements of the WIPO Internet treaties – is a policy choice: no international treaty or trade agreement requires Canada to adopt such a right. If we go this route, we will have no one to blame but ourselves.

## **2. Circumvention for Legal Purposes**

Consumers enjoy certain rights to use content without infringing copyright. The presence of technological measures doesn't change that, and neither should anti-circumvention laws. Consumers must be able to circumvent technological measures, like DRM, providing that their access to the underlying content does not infringe copyright. These consumer rights fulfil important public policy goals, preserving consumer welfare, free speech, and innovation. The use of technological measures already threatens these values. Anti-circumvention laws shouldn't statutorily undermine them as well.

## **3. No Legislation Against Devices and Services**

Around the world, even under the most restrictive anti-circumvention regimes, users enjoy certain exceptions to liability for circumvention of technological measures. However, prohibitions on selling the tools, devices and services that permit circumvention frustrate these exceptions. Anti-circumvention legislation should not prevent people from developing, selling and using tools, devices and services for circumventing technological measures for legal reasons.

Anti-circumvention laws must be narrowly targeted to prevent behaviour that infringes copyright. These laws should not be so broad that they undermine innovation. Devices like PVRs (Personal Video Recorders), iPods, and the services that permit them to function, enhance consumer welfare and the vibrancy of the digital entertainment marketplace. Their developers should not have to run the risk of being found liable for violating anti-circumvention laws.

## **4. Preserve Rights and Expectations that Consumers have under Copyright**

Consumers expect that they will be able to deal with their digital content in certain important ways. For example, consumers expect that they will be able to make software back-ups, rip a new CD they've purchased to play it in an iPod, and quote passages from a book in a review. Copyright law protects some of these dealings; others are simply expectations derived from common practices. Anti-circumvention laws potentially undermine consumers' legitimate expectation that they will continue to enjoy these rights.

### ***a. Consumers Stripped of Legitimate Rights and Expectations***

Excessive anti-circumvention laws have the potential to harm consumers by stripping them of these rights and frustrating these legitimate expectations:

- (1) consumer electronics will cost more and have fewer functions;
- (2) consumers will not be allowed to transfer legal, paid-for content to devices of their choice;

- (3) it will be illegal for consumers to backup their legal, paid-for content to protect their investments against accidental destruction or erasure; and
- (4) it will be illegal for consumers to convert legal, paid-for content to formats that will function on new devices.

***b. Less Choice and Fewer Rights***

Anti-circumvention laws don't enforce copyright. They enforce the contractual terms imposed by a content distributor. These terms reflect the distributor's private interest, and don't necessarily reflect copyright's public policy objectives. By privileging these private terms, anti-circumvention laws lend the power of the state, and all of the remedies available in the *Copyright Act*, to these imposed terms. These terms can prohibit activities like criticism and research, activities that serve important public interests. In some cases consumers may not even be allowed to re-sell or give away the music or videos that they already own. Ultimately, consumers will enjoy less choice in the marketplace.

***c. Copyright Law Exceptions***

Since anti-circumvention laws privilege access to content, tipping the balance of copyright in favour of private interests, they must incorporate certain exceptions to liability. Those exceptions should mirror *every* exception that currently exists in the *Copyright Act*. These exceptions are important; they further crucial public policies, including consumer welfare, innovation, freedom of speech, and security. Specific exceptions to liability for circumvention should include:

- (1) access for people with disabilities;
- (2) benefits for educational institutions;
- (3) benefits for libraries, archives and museums;
- (4) reverse engineering;
- (5) incidental inclusion;
- (6) ephemeral recordings;
- (7) private copies of musical sound recordings;
- (8) back-ups of computer programs; and
- (9) fair dealing.

Two of these exceptions merit specific discussion:

*Private use of Music* – Anti-circumvention legislation must also allow consumers to continue to copy music for private use. In exchange for this right Canadians pay a levy on blank CDs and DVDs. The money Canadians pay for their right to copy music for private use goes to rights-holders. If anti-circumvention laws make it illegal to copy music creators and consumers will be hurt and, copying will continue, and Canadian artists will see an important revenue stream disappear.

*Backup Copies of Software* – Consumers must be able to make back up copies of their software, even if that software is protected by technological measures. Back-ups protect consumers' investment in content. Outlawing back-ups only frustrates consumers' legitimate expectations.

## **5. Protect Consumer Privacy**

Many technological measures, like DRM systems, make access to content conditional on consumers' surrendering their privacy. This practice is invasive and has nothing to do with protecting intellectual property. These systems target consumers' personal information and personal habits. Justice Lebel of the Supreme Court of Canada identifies this type of information as "core biographical information". Anti-circumvention laws should not protect technologies that do not respect these privacy rights:

- consumers should retain the right to enjoy works privately;
- access to content must not be conditional on the surrender of consumer privacy; and
- circumvention, in order to protect privacy rights, should be permitted.

## **6. Illegal Activity**

DRM and other technological measures are like spyware in that they are technologies that consumers potentially do not want. Consumers deserve notice of the presence of technological measures and must consent to their use. Anti-circumvention laws should not protect content distributors that do not meet these requirements. Removal of unwanted and illegal technology should not be a violation of anti-circumvention laws.

## **7. The Public Domain**

Technological protection measures may potentially eliminate public access to content that is in the public domain. Anti-circumvention laws offer content distributors a way to circumvent the bargain inherent in copyright's grant of exclusive but *limited* rights. Copyright in every work, from the banal to the sublime, expires. All work eventually joins the common heritage that is the public domain. It should always be legal to circumvent in order to access works that are no longer protected by copyright.

## **8. Protect Consumers Against IP Misuse**

Technological measures like DRM have been shown to pose anti-competitive threats to consumers. Similarly, anti-circumvention laws have been misused in other jurisdictions. Any Canadian anti-circumvention law should be balanced by the creation of specific competitive protections for Canadians and the creation of liability for "copyright misuse."

## **Part 2) Rational Copyright Laws**

There are many facets of copyright law that run counter to the interests of Canadian consumers and do not reflect the realities of the Canadian marketplace. Canada needs to bring current copyright law into step with the ways consumers use copyrighted materials.

There are several changes we can make to existing copyright law that will significantly benefit Canadian consumers:

- (1) clarify the legality of time, space, and format shifting;
- (2) expand fair dealing rights;
- (3) expand back-up rights;
- (4) minimize the term of protection;

- (5) eliminate statutory damages for consumer copyright infringement;
- (6) eliminate crown copyright;
- (7) ensure continued consumer ownership of commissioned photographs;
- (8) balance the impacts of private ordering;
- (9) clarify that ephemeral digital copies do not infringe copyright; and
- (10) monetize P2P.

## **1. Clarify Legality of Time, Space, and Format shifting**

Common consumer practices frequently result in “technical” copyright violations. Time shifting (the recording of a broadcast for enjoyment later), space shifting (copying content for use on a device other than the one for which it was originally intended), and format shifting (the copying of information from one form of storage to another) are all technically violations of the *Copyright Act*.

These violations can have a very real effect on consumers and are not at all in line with the expectations of Canadians. It has been legal to time shift in the U.S. for over 20 years. VCRs and PVRs are sold openly on the Canadian market for this very purpose. Yet, inexplicably, Canadians do not enjoy a clear exception from liability for using a VCR.

Space shifting occurs when a consumer moves content on one type of format to another. For example, someone who takes their old Betamax videotapes and copies them to VHS has space shifted. Doing this is a violation of copyright law in Canada, despite the fact that this is a common and reasonable practice among consumers.

Finally, anyone who has ever copied a VHS tape onto a blank DVD so they could watch it on their player, has format shifted, and has arguably also violated the law.

Copyright of this kind threatens consumers. It is out of step with reasonable consumer practices and is *never* litigated by even the most grasping of copyright owners. It is long past the time for Canada to legalize these practices.

## **2. Expand Fair Dealing Rights**

Many countries, including Canada, have exceptions for the use of content in ways that are fair but that, but for the exception, infringe copyright. In Canada, this right is known as “fair dealing” and it permits dealing with copyright protected content for the purposes of research, private study, criticism, review or news reporting.

Fair dealing does not plainly apply to reverse engineering, time, space or format shifting, or transformative uses such as satire or parody, appropriation art, or digital sampling. All of these practices are at the core of the public policies that the *Copyright Act* is supposed to further. Parody, appropriation art, digital sampling and other forms of transformative use of content are also expressive practices that embody the essence of the values enshrined in the *Charter of Rights and Freedoms*. Copyright should permit these creative practices that benefit all Canadians. Three simple reforms would address this short-coming.

First, the current law denies the defense to any dealing that does not fit within an enumerated category, no matter how fair. Amending the provision to read, "...fair dealing for purposes including", rather than "...for the purposes of", would accommodate those practices.

Second, while we view the current categorization approach as too restrictive, the categories do offer certainty. Accordingly, the categories of dealings expressly identified as falling within the defense should be expanded to include other identifiable categories such as parody.

Third, Parliament should do away with the Act's requirement to provide the source and author (where given in the source) in the case of fair dealings for the purposes of criticism, review, or news summary. These provisions prove particularly challenging for creative, transformative uses such as parody to meet. This is a well-intentioned but needless effort to introduce attribution rights into the fair dealing analysis. No court should rule against use of content that is "fair" simply because it fails to cite the source and author of the work in question.

### **3. Expand Back-Up Rights**

Consumers enjoy the right to make back-up copies of software, but not of other content like music and movies. Consumers spend a lot of money of digital content and media can be fragile: DVDs and CDs scratch and hard drives fail. Consumers should enjoy the right to protect their investments by making back-up copies of legal, purchased content.

### **4. Minimize the Term of Protection**

Do not forget: copyright is a monopoly, and, like all monopolies, imposes costs on society. Those costs should be minimized. Academic studies demonstrate that the term of protection for copyright already far exceeds anything economically justifiable. Copyright terms should be reduced or kept to the minimum needed to meet our international obligations.

### **5. Eliminate Statutory Damages for Consumer Copyright Infringement**

The minimum penalty for copyright infringement in Canada is wildly out of step with the real world costs of infringement. The rights holder has the option of requiring anyone found liable for infringement to pay statutory damages, ranging from \$500.00 to \$20,000.00 per violation.

Statutory damages are awarded at the rights-holder's option, irrespective of any actual damages suffered or proven by the rights-holder. If you were found liable by a judge for photocopying an article from a newspaper and distributing it to fifty friends and colleagues, your *minimum* damages would be \$25,000. Considering that daily newspapers cost about a dollar each, this minimum damages award is completely out of step with the actual cost of infringement.

We see this phenomenon at work in the United States. Rights holders are using the threat of enormous statutory damages to extort settlements in file-sharing lawsuits, despite the fact that these rights holders have failed to prove that file-sharing is responsible for any economic harm to their businesses.

Statutory damages should be eliminated for instances of infringement by consumers, public institutions, museums, libraries, archives, schools, colleges and universities. Plaintiffs should be

required to prove damages. The role of statutory damages should be restricted to those cases where they will have the greatest effect: cases of commercial copyright infringement.

## **6. Elimination of Crown Copyright**

A surprising aspect of Canadian copyright law is that the government has granted itself exclusive rights in works it produces. This is called “crown copyright”. Content paid by and produced for the benefit of Canadians should be freely available to Canadians. Crown copyright should be abolished, and works produced with public funds should be made freely available to the public without any restrictions.

## **7. Consumer Ownership of Commissioned Photographs**

Copyright ownership of commissioned photographs should stay in the hands of consumers. This is the normal practice in the industry today. Consumers own copyright in their commissioned wedding and baby photos. Anything else is an affront to consumers and does nothing more than frustrate their legitimate expectations. The government should resist calls to trample consumers’ rights in their own photographs.

## **8. Balance the Impacts of Private Ordering**

Increasingly, copyright owners license the use of content to consumers through contracts such as end user license agreements (EULAs). The EULA dictates the terms of use to the consumer; the terms are not negotiated in any meaningful sense. TPMs provide copyright owners with the ability to enforce the terms of these contracts. The end result is that consumers are often unable to use lawfully purchased content in ways that are expected. In some cases, consumers are even denied rights granted to them under the *Copyright Act*.

With the proliferation of restrictive contracts for the use of content, private interests are essentially able to re-write the rules of copyright in their own favour – a process that has been referred to as the “private ordering” of copyright. This can be an unfair process that is biased in the favour of copyright owners. Consumers have little if any ability to bargain for better terms of use. In this way, “private ordering” can replace copyright’s balancing of the interests of users and rights holders – a balance set by law-makers accountable to the Canadian public – with an allocation of rights that reflects the private interests of the rights-holder, who is not accountable to anyone. Private ordering has no need to accommodate values such as privacy and freedom of expression, and in fact opposes other public interests such as the need to foster competition and follow-on innovation through reversed engineering and interoperability research.

Copyright policy should reduce the unfairness that is inherent in the process of private ordering. The *Copyright Act* should protect certain consumer rights, including the ability to undertake security, interoperability and reverse engineering research, make reasonable use of content (time-shifting, space-shifting), to make private copies for personal use, and to re-sell content, notwithstanding contractual terms to the contrary.

## **9. Clarify that Ephemeral Digital Copies do not Infringe Copyright**

The *Copyright Act* affords rights-holders only limited rights. It has never been an infringement of copyright law for a consumer to simply read a book, or to listen to music in the privacy of

one's own home. These are important user rights that reflect fundamental liberty and privacy values that underpin Canadian society.

As we have shifted from analog to digital formats, these rights are coming under attack. Some rights holders view the use of digital content – reading an e-book, or listening to an MP3 music recording – as not non-infringing private use, but rather a reproduction of a work that infringes copyright where the reading or listening occurs without the rights holder's permission. This startling view rests on a characterization of the “RAM copy” – a temporary copy of a work in a computer's short term memory – as sufficiently “fixed” to qualify as a copy for the purposes of the Copyright Act's reproduction right. This argument is fallacious: the digital content is completely ephemeral – it is no more “fixed” than a book reflected in a mirror – and derives from an accident of technology rather than a deliberate effort to reproduce a work.

To hold that an “unauthorized” RAM copy infringes copyright would be to create a new exclusive right to read digital content. Such a right would radically tip copyright's balance in favour of rights holders and away from consumers interests, with unfortunate implications for freedom of expression, liberty, and consumer privacy. The government of Canada should clarify that ephemeral digital copies are not sufficiently fixed to implicate the reproduction right.

## **10. Monetize P2P**

For a decade now, Canadians have used peer-to-peer file-sharing services to access music and other content. The content industry has responded by suing consumers, attempting to shut down P2P networks and locking down content with technological measures. These efforts to kill file-sharing have failed. Today, file-sharing is more popular than ever and Canadian artists are *still* not being paid for content shared by their fans. The time has come to look for alternatives. Consumers deserve access to the services of their choice, and artists deserve to be paid. Finding ways to transform P2P networks into legitimate music distribution and compensation vehicles would unleash a wave of innovation that could only benefit Canadian music creators and their fans. It is time the Canadian government showed some leadership and undertook active study of this option.

## **Our Call**

We are concerned that proposals to change Canada's copyright laws do not represent the interests of Canadian consumers. These proposed changes remove many rights that consumers have traditionally enjoyed and fail to address obvious changes that would benefit consumers and creators. What we want are laws that:

- (1) do no harm to Canadians;
- (2) are based on reality, not rhetoric; and
- (3) serve Canadians.

### **1. Do No Harm**

Changes to Canada's copyright laws must be guided by the principle of "do no harm". We must not enact changes that harm consumer welfare and threaten education, freedom of expression,



privacy and security. We do not want laws that harm small business, stifle innovation, or that cost Canadians millions of dollars.

## ***2. Considered Copyright***

The Canadian government must consult experts on education, security, privacy, small business, and consumer groups. Our copyright laws should be based on the facts, not on rhetoric.

## ***3. Canadian Laws Must Serve Canadians***

Statistics Canada reports that our copyright royalty deficit – the amount of royalties generated by Canadians abroad compared with royalties earned by foreign performers in Canada – has grown dramatically in recent years. For every \$1 earned by Canadian performers outside the country, \$5 flows out of the country. Proposals for longer and stronger copyright will increase the flow of dollars out of Canada, rather than foster Canadian creativity. It is important that we address this trade imbalance and focus on the needs of Canadian creators and consumers rather than the self-interested demands of a limited group of rights holders.

Where changes to copyright laws are needed, Canada must adopt laws that serve Canadian interests first. Pressure from American interests and proposals that primarily benefit foreign distributors should be rejected.