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June 18, 2008

## So What's in the New Copyright Bill

Jeremy de Beer, *University of Ottawa*



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## So what's in the new copyright bill?

### Globe and Mail Update

So what does the proposed copyright legislation, Bill C61, have in store for you? Aside from not being able to download free music any more, it puts all sorts of limitations on intellectual property and how it can be used.

The Canadians' worst fear is that the bill has been unduly influenced by the powerful U.S. music, movie and TV lobby, which managed to get the U.S. Congress to pass the Digital Millennium Copyright Act, which gives corporations such as the music industry unprecedented powers to investigate and enforce copyright law. Among other things, the DMCA is unclear about the concept of "fair use," which Canada calls "fair dealing," which allows use of content for purposes such as satire.

- **To figure out what's in the bill — the good as well as the bad — we've asked University of Ottawa law professor Jeremy deBeer to discuss it with our readers on Wednesday, June 18, from 12 p.m. to 1 p.m. Join us then or [leave a question in advance](#).**

The bill proposes to drop the personal penalty for infringement from \$20,000 per case to \$500; however, the bill keeps the provision that anyone who has cracked or avoided digital-rights management controls is liable for a fine of \$20,000 per infringement.

And how will the bill reconcile itself with another proposed law, the secretive Anti-Counterfeiting Trade Agreement (ACTA), which would allow border guards to seize devices that they suspect of containing material that infringes copyright, and would force Internet service providers to reveal the identities of suspected infringers without a court order?

To figure out what's in the bill — the good as well as the bad — we've asked University of Ottawa law professor Jeremy deBeer to discuss it with our readers on Wednesday, June 18, at 12 p.m. to 1 p.m.

Prof. deBeer specializes in classic and intellectual property law, and the intersection between property, IP and torts, and is a member of the law faculty's law and technology group. He has worked for the Department of Justice and as legal counsel to the Copyright Board of Canada.

He has written about the constitutional implications of copyrights, the role of copyrights in the music and entertainment industries and the notion of balance in copyright and patent law.

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**Jack Kapica, moderator, writes:** Welcome, Prof. Jeremy deBeer, and thank you for joining our discussion about the contents of the proposed amendments to the copyright legislation. We" start off with this question:

**Brian Lowry from Fredericton writes:** Jeremy — do we really need to care what's in this bill, given that it almost certainly will either die before being passed, or simply be defeated?

**Jeremy deBeer answers:** Yes, Brian, I think we should all should care deeply about what's in this bill. It has serious consequences for all Canadians.

There are no guarantees what will happen with the political situation in Canada. If the Conservatives stay in power, the fate of the bill will turn on the attitudes and actions of Canadian voters. And if they don't, the principles in this bill could form the basis for future proposals. Either way, this stuff is important.

So no matter what your perspective is, you should make your views known to people that matter. You can start by sending your MP a letter saying how you feel (no stamp needed if you send c/o the House of Commons K1A 0A6).

**J Swede from Edmonton writes:** Two Questions: 1. Let's say I have purchased a DVD from the store (*Alien*, for example). Under the new law, am I able to rip this DVD for viewing on my iPod Classic? 2. If I am able to format shift this DVD to my iPod, what's the difference between ripping it myself and downloading an already ripped version using P2P? I already own a licence to view this particular movie and I find it a lot easier and quicker to download the already ripped versions rather than do it myself. Am I breaking the law? If so, why? I've already paid to view this movie ...

**Jeremy deBeer answers:** This is a long-winded answer, but it is an important question, so please bear with me.

What you describe doing is commonly called "format shifting" — moving content you've legally acquired from one format to another, like DVD to iPod. Though Industry Minister Jim Prentice correctly explained that the Bill contains provisions to permit ordinary activities like format shifting, the devil is in the details.

Ripping DVDs to laptops, iPods or even backup discs would not be allowed under the proposed law. The various format shifting exceptions only apply to music, photos, books, newspapers, magazines and — get this — videocassettes, like VHS and Betamax tapes. Yah, I know. Weird. What century are we in?

If you do want to digitize your VHS collection, though, the good news is that you can do that. But only under certain conditions. You've got to own, not rent or borrow, the tape. You can't get rid of the old tape without deleting the copies first. It has to be your own iPod, computer or DVD that you're copying to. And no selling, lending or giving away the copies, not even to close friends or family.

Back to the DVD example for a second. Even if you were allowed to format shift your DVDs (which under this Bill you're not), you'd probably be technologically prevented from doing so. Most DVDs are region coded, so, for instance, the disc you bought legally in Europe won't play in your machine back home.

Under the proposed law, circumventing the "technological measure" is prohibited, even if you just want to watch the disc, let alone copy it. If you think that doesn't matter, because you won't get caught, ask yourself how you'll find the tools do make your movie-watching possible. Those tools are outlawed, and people caught circulating them could be subject to a million-dollar fine (literally) and up to 5 years in jail.

So that is one practical example of how the infamous anti-circumvention provisions would operate if this Bill becomes law.

Oh right, to answer, your question: no. You can't do that. Sorry.

**Steve Ireland from Smiths Falls, Canada, writes:** If I happen to miss an episode of a favourite TV show, I find it very convenient to download the show using BitTorrent and watch it after normal airing times. Would the bill prevent us from doing that? ...

**Jeremy deBeer answers:** Steve: You might think that what you're doing is in effect not all that different from "time shifting" so it should be allowed. Sorry to tell you that's its not.

Under the proposed law, you'd be allowed to use your PVR to record shows from satellite or cable. (That is, as long as you don't keep a library of shows longer than necessary to watch at a more convenient time.) But this doesn't apply to anything streamed over the Internet. And it certainly doesn't apply to downloading a show if you missed the last episode.

Using BitTorrent to do this would be infringement of the worst kind, because you'd be both downloading and uploading. That's big-time infringement.

**Jim Sst from 700th Mission Cap Canada writes:** Please give an idea of exactly what "statutory damages" means.

**Jeremy deBeer answers:** Great question to begin with, Jim. There's been a lot of talk about the proposed law limiting "statutory damages" to \$500 if the infringement was for private purposes.

So what are statutory damages? Well, it means the Copyright Act says that copyright owners can win a case without proving how much harm, if any, they've really suffered from a defendant's activities. They don't have to prove to a court they've actually lost any money if they elect to claim statutory damages.

Statutory damages are good for copyright owners, because with all of the conflicting evidence about the effects of p2p file sharing, for example, it would be pretty hard to prove actual damages. This is why the RIAA was able to win \$220,000 last year from a Minnesota single mother for sharing 24 songs online. There's no way the record companies could have come up with evidence that they lost that much money over two CDs worth of music. But they didn't have to, because the U.S. statute (like the Canadian one) spells out a range of damages that courts can award automatically.

There you go. That's statutory damages in practice.

**Lorne Kelly from Kemptville, Ontg., writes:** There seems to be confusion over whether the \$500 and \$20,000 charges would take the form of a fine or a lawsuit, and whether the charge is per song or per suit/fine. Can you clarify? ... I do not believe the CIRA/RIAA when they say they are not interested in suing fans. CIRA already tried to obtain IPs of file sharers, why else would they do that? ...

**Jeremy deBeer answers:** All right. Staying on the topic of statutory damages, you're right, Lorne, that there's a lot of confusion about how this \$500 limit would work.

First, it isn't a fine like a ticket for speeding or littering or something. The police won't enforce it. It's up to copyright owners themselves to file a lawsuit, if that's what they want to do. And I share your skepticism about promises not sue ordinary Canadians for file sharing.

Second, the proposed new law says that a copyright owner can collect only \$500 total in statutory damages for all copyright infringements committed before the lawsuit was filed. But — and here's a big but — this only applies to infringements done for private purposes. And the limit doesn't apply to infringements made possible by circumventing digital locks. And it won't get you off the hook even for private infringements committed after you've been sued.

I wish I could tell you what qualifies as "private purposes," but the truth is that nobody really knows for sure. Ripping a DVD to your laptop is probably private. Using a P2P network to share files probably isn't.

So I don't think the proposed limitation would stop a court from awarding damages in the hundreds of thousands of dollars against file sharers, like we've seen in the United States. Still, the idea of limiting

statutory damages like this is a good one. With a little more clarity in scope, it could make most people happy.

**Wallace McLean from Canada writes:** How do the changes to photography provisions impact the consumer and the public?

**Jeremy deBeer answers:** Very interesting that you bring this up, Wallace. This aspect of the proposed law has been mostly overlooked by the media, but it matters in practice to a lot of people.

Current copyright law in Canada says that if you commission a photograph (or portrait or engraving), then by default you're the copyright owner. The proposed law would change that to make the photographer the owner instead.

That means you probably couldn't stop the photographer from using photos of your wedding or your baby however he or she wants to. You could, of course, change this by contract, but only if you're smart enough to do so, and you'd probably have to pay for it.

Now, to go along with this change, there's a proposed new provision that would allow you to use those commissioned photos for private or non-commercial purposes. So e-mailing them to grandma might be okay, but posting to a public Facebook page puts you over the line.

And, as far as I can tell, it would still be strictly prohibited to tamper with any technological locks on the photo, or to mess with the photographer's watermark, for example. The bottom line, then, is that the photographer calls the shots when it comes to copyright.

**Marty McFly from Toronto writes:** I don't really understand the part in the bill discussing crossing the border with copyrighted materials. Can you clarify this and also how they plan to enforce it?

**Jeremy deBeer answers:** There's a bit of misunderstanding here. THIS Bill doesn't do much when it comes to cross-border issues. What you might be thinking of is the likely new Anti-Counterfeiting Trade Agreement, or ACTA for short.

A bunch of governments, including Canada's, have been negotiating this new international agreement over the past while. Nobody really knows what's being talked about, because there's been almost no transparency and no public consultation of Canadians.

But rumours are that parts of the agreement could give customs and border officials more powers to seek out copyright-infringing files. It might mean searches of your laptop or iPod, but is that really going to happen? Who knows. I can't say.

I can say, however, that if you're concerned about this, you should speak out. Demand a public consultation on ACTA, and don't take no for an answer.

**Joe Technicality from Hamilton writes:** So I'm your average kid on the block who likes to download a movie now and again (using torrent-based software) for personal viewing only. Are they coming after me? And in Canada, does my ISP have the right/duty to disclose my Internet usage to the enforcing agencies of this proposed legislation?

**Jeremy deBeer answers:** Well, I think I've already touched on some of the issues, but here's my answer for you.

Using torrent-based software means your both uploading and downloading at the same time. That's how torrents work. It means what you call "personal viewing" ain't. It's not personal, that is.

Are "they" coming after you? If "they" are the record companies and movie studios, maybe. Depends who you believe.

Better question is, *can* they come after you? That requires a bit of co-operation from your ISP. A court

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decision (called *BMG v. Doe*) a few years back held that ISPs didn't have to turn over subscriber information, but that case was pretty fact-specific. The court gave copyright owners step-by-step instructions on how to make ISPs disclose this kind of info, and there's not much I can see in the bill that would change the court's ruling.

**Mike Bleski from Greater Sudbury writes:** A few general questions. 1. When an artist or copyright holder releases his or her materials for public release, say, on MySpace.com or on their personal website, you can't download it unless they have a free usage policy posted? 2. I have heard talk about searches on electronic devices at the border. Will there be content searches on MP3 players, laptops, and related devices?

**Jeremy deBeer answers:** That's the normal rule, yes. The copyright owner gets to say whether or not you can download their content. Maybe they'll have a "free usage policy" such as a Creative Commons licence. Maybe they won't. But it's up to them.

Now, there's a very odd section of the proposed bill that applies especially to teachers and educational institutions. That section says that educators are allowed to download all they want for teaching and training purposes *unless* the copyright owner says otherwise. And there's no requirement that the teachers deal "fairly" like is necessary with other exceptions.

That turns copyright law on its head. I'm not saying that educators don't need more flexibility. Just that this approach seems strange and unworkable. There are better alternatives.

**Charles Morgan from Montreal Canada writes:** Don't TPMs really enable businesses to offer a variety of new and innovative services at a variety of price points (e.g. \$20 to "buy" a film; or \$3 to "rent" the same film by downloading a copy for time-limited use)? Who would make investments in copyright protected works (music, films) knowing that Canadian law doesn't protect property in digital form?

**Jeremy deBeer answers:** This is really good question. I don't know there's a right answer, though. Do TPMs enable new business models, or stifle them? Ask different people and you'll get different answers, mostly based on speculation, assumptions and maybe some anecdotal evidence.

I do know that there are lots of folks investing time and effort and money in innovative products and services online without legal prohibitions on circumventing TPMs. Apple's announcement (before the new Bill was tabled) that it would roll out online movie rentals in Canada is a good anecdotal example. The number of record labels moving away from TPMs is another.

But in the end, I think it comes down to this. We really don't know whether TPMs will help or hinder online business. We don't even know what online business will look like in 3, 5 or 10 years. So my take is that it isn't worth the risk of unintended consequences by codify anti-circumvention provisions.

The Israeli government just recently decided to take a "wait and see" approach to TPMs. I think that's the right way to go.

**Jonathan Migneault from Canada writes:** How will the concept of fair dealing work after this bill is passed? Will Rick Mercer face legal consequences if he uses a movie clip for satirical purposes on his show?

**Jeremy deBeer answers:** Well, I won't speak to the Rick Mercer example specifically, but the topic of satire and parody is a crucial one. Unfortunately, there's nothing in the bill to talk about. The government left this out of the reforms.

The U.S. and many other countries have in their "fair use" rules room for people to express themselves through satires or parodies of other works. Canadian law currently allows "criticism" but in the past, courts have held that this doesn't allow parody.

I think (for various complicated reasons) that a court would rule differently today, and say that parodies

are permitted in Canada if they're fair. But the government could have helped out a lot by expanding the scope of fair dealing in a more general way.

What the bill does is set out a number of specific things that, under certain limited conditions, are allowed as exceptions to copyright. I've already explained the technicalities attached to format and time shifting. The so-called educational exceptions are even more laden with limitations.

Anyway, short answer is: no permission for parody in this bill.

**Bill Jones from Canada writes:** My brother in the United States can rent and download movies straight to his computer from Netflix. I can't get similar service here in Canada. Why are my options so limited? Are U.S. providers afraid of our weak copyright protections?

**Jeremy deBeer answers:** I'm not sure about Netflix, but like I answered another question, Apple has announced that online movie rentals are coming to Canada (regardless of the good or bad state of our copyright law).

The commercial reality is that there are all kinds of complicated reasons a service like this would or would not come to Canada. Copyright is one reason, I'm sure, but I think the overall competitive and regulatory environment is a bigger deal for companies.

And really quickly, there might be examples of innovative companies not coming to Canada because our laws are not flexible enough. For a long time you couldn't get TiVo north of the border. One reason was rumoured to be the legal liabilities that the company might have incurred because, unlike in the US, Canadian customers weren't have been allowed time-shift, which is what the TiVo does.

**Xavier Spriet from Windsor Canada writes:** Since 1997, we've already been paying a blank media levy on all new blank media purchases, and the CRIA has already distributed over a hundred million dollars from that levy alone. Could you please explain what the overlap between the goals of the new bill and the goals of the levy might be, and what the ramifications are for the Canadian consumer?

**Jeremy deBeer answers:** Well, small technicality, but it isn't actually CRIA collecting and distributing the money from the private copying levy. It is actually another organization called the CPCC, which represents not only record labels but also performers and composers as well. And I think the levy revenues are closer to a quarter of a billion dollars, but whatever.

Your point is that now we've got some provisions in the new bill that allow format-shifting for free (like moving CDs to iPods) at the same time we've got a private copying system that charges people for essentially the same activity (like moving CDs to other CDs). I understand your frustration. It doesn't make sense.

For what it's worth, the government has committed to a fall consultation on the private copying system, so you'll have your chance to be heard then. Why they'd come out with this law first, without a recent consultation, is beyond me.

For the consumer, the practical answer is that you'll continue to pay the levy on blank CDs. Take comfort knowing that most of that money goes to support the Canadian music industry.

**Bill Jones from Canada writes:** Even though the protections in the U.S. Digital Millennium Copyright Act are much stronger than those in this bill, don't some artists still use innovative techniques such as Radiohead's 'pay what you want' model? Just because locks exist doesn't mean that they will be used. Aren't artists still free to innovate in their content delivery?

**Jeremy deBeer answers:** I like this question, because it is a common one. For the most part, there's nothing in the bill that would *force* anyone to use digital locks on their content. So what's the problem?

I've asked a lot of artists — musicians, filmmakers, authors and others — this exact question. And almost all of them tell me it isn't that simple.

One of several things they often say is that when some copyright owners choose to lock down content, consumers get frustrated. When consumers get frustrated, they look for alternative sources of music, like P2P networks. That's bad for the whole business.

Another thing actual creators are quick to point out is that they need access to existing material to create new content. Documentary filmmakers are a perfect example. These creators can't do their job if their locked out of content, even if what they ultimately want to do would be legally permitted as a fair dealing.

That's why organizations representing creators, like the Documentary Organization of Canada and the Canadian Music Creators Coalition have come out strongly against digital locks and against this bill. Some rights-holders feel much differently, I know. It shows how deep the divisions are over this issue, even among copyright owners themselves.

**Brett Johnson from Ottawa writes:** I think the fears that are being propagated over Bill C61 being a carbon copy of the U.S. DMCA are unfounded. Critics are calling it the "Canadian Digital Millennium Copyright Act", but is this really true since there are clearly a number of exceptions which benefit private users and are not found in the U.S. legislation?

**Jeremy deBeer answers:** Whatever you want to call the bill, the differences between it and U.S. law aren't all that different. All or most of the "consumer-friendly" balancing provisions in the bill, like format and time shifting for example, are probably allowed in the U.S. under its more general "fair use." On that point, I actually think consumers would benefit if this bill were *more* like U.S. law.

The Canadian bill does set out a "notice and notice" system for ISPs, which is quite different from the U.S. law. That's a pretty good feature of the bill.

Mostly, I think the label comes from the similarity in terms of the anti-circumvention provisions. And those are the most significant parts of the bill.

**Daniel Pollack from Toronto writes:** Critics of the bill say that it affects consumer privacy. Isn't it true that PIPEDA will apply to the uses of TPMs just as it does to any other technologies? How is it different?

**Jeremy deBeer answers:** Okay, time is running out, but this is a good one. The answer is that yes, I think Canada's existing privacy law would apply to technological measures and copyright-related enforcement activities, just like anything else.

Note though that the privacy laws apply to conduct, not to technologies. There are a few other points worth mentioning. Canada's privacy legislation isn't all that strong, it comes with a pile of exceptions, and it can be trumped by contracts in some circumstances.

I totally admit that's a problem for privacy lawyers, not copyright lawyers, but the issues are related. We've seen the Privacy Commissioner come out an express concerns about technological measures and rights management information practices, which is good. I think more people need to talk about these issues, so that all concerns are heard.

**Jonathan Migneault from Canada writes:** Is there any evidence that Minister Jim Prentice met with interest groups like Fair Copyright for Canada when he worked on this bill? When he was interviewed on the CBC's As it Happens he completely avoided this question (along with the concern that U.S. corporations had undue influence on the process).

**Jeremy deBeer answers:** If enough people demand it, I can't see how the government can ignore public outcry. So, like I said at the beginning, no matter what your perspective on the bill, speak up. The government needs to hear what you think.

**Gerry Hollerman from Toronto writes:** I work in a library in the private sector which recirculates information, particularly professional readings, to individuals throughout our firm. We also perform a great deal of research on behalf of professionals in both print and electronic media. Our library is among

the dozens of libraries in hospitals, accounting firms, law firms and other corporate entities in Toronto alone. Our staff work hard to remain within the bounds of the "fair dealing" provisions of the Copyright Act as interpreted by the Supreme Court in *Law Society of Upper Canada vs. CCH Canada Ltd.* That case provided us with a good deal of assurance that we were within our rights to reproduce and share copyrighted materials, within certain limits, for the purposes of research. Without those rights, we would be unable to function. Or at the very least the cost of licensing or subscribing to many publications, both in paper and online, would become exorbitant. Will the proposed changes to the Copyright Act change in any way or to any degree our ability to reproduce and share copyrighted materials?

**Jeremy deBeer answers:** Yes, the new bill will affect your ability to reproduce and share copyrighted materials. One quick concrete example concerns interlibrary loans. If you want to send a digital copy of materials that you would have sent by snail mail in the old days, that's okay. *But* you have to take measures to ensure that the recipient doesn't make copies and that the recipient can't use the copy you sent for more than five days. Whether this means you need to draft new contracts with your ILL partners, or start using TPMs is unclear. What is clear is that this bill will have significant effects on you and your activities.

**Jack Kapica, moderator, writes:** We've gone beyond our hour-long limit, and should close this discussion. I want to thank all those who wrote questions and offer our apologies for not answering all of them. I especially want to thank Jeremy deBeer for helping us all out trying to understand what the government wants from us in this complicated and contentious bill.