

Frequently Asked Questions (and answers) on Bill C-32: An Act to amend the Copyright Act (first reading: June 2, 2010)

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The following are some frequently asked questions, or clarifications of frequently made statements. Unless otherwise stated, answers are my own. This document is updated from time to time, so please go to <http://BillC32.ca/faq> to download the latest before printing.

Introduction of Author

I have been a self-employed technology consultant since 1995¹, working as a hardware repair person and system administrator before that. Technology experience starts in the early 1980's². As part of my job I author software.

I have been actively involved in the copyright file since the summer of 2001 when I was warned that Canada was contemplating passing a US Digital Millennium Copyright Act (DMCA)-like law in Canada. I was already very familiar with the unintended consequences of the anti-circumvention aspects of the US DMCA, and did not want this harm to be brought into Canada. I have attended many conferences over the near decade, and have had extensive conversations about copyright law with fellow creators as well as people who primarily consider themselves audiences of creative works. I have had multiple meetings with the bureaucrats at Copyright Policy Branch, Heritage Canada, and the Intellectual Property Policy Directorate, Industry Canada. I have had the opportunity to debate copyright law with lawyers in front of audiences.

I am the host for the Digital Copyright Canada forum³ (which also uses the BillC32.ca domain), co-coordinator of the GOSLING (Getting Open Source Logic INto Governments) community⁴, and policy coordinator for CLUE: Canada's association for Open Source⁵.

1 Work website and full contact information is at <http://Flora.ca>

2 Work experience published on my work website at <http://www.flora.ca/experience.shtml>

3 URL is <http://Digital-copyright.ca> . Information on history is at <http://www.digital-copyright.ca/about>

4 URL is <http://GOSLINGcommunity.org> . We meet informally each Friday at the Parliament Pub in Ottawa.

5 Policy summary is published at <http://cluecan.ca/policy> AKA <http://linux.ca/policy>

Table of Contents

Introduction of Author.....	1
Questions:.....	3
Q: The government has indicated that C-32 offers a "balance between the interests of consumers and the rights of the creative community". Would you agree?.....	3
Q: Many claim that Canadian Copyright is outdated. Is that true?.....	3
Q: Is Canada obligated to ratify the WCT and WPPT?.....	4
Q: Is the ratification of the two 1996 WIPO treaties good for Canada?.....	5
Q: When discussing so-called "digital locks", what is the most important question we should be raising?.....	6
Q: Are the technical measures provisions of Bill C-32 simply an implication of that section of the 1996 WIPO treaties?.....	7
Q: Does the WIPO guide to treaties demand "access controls" and prohibitions on tools and services?.....	8
Q: Why is it a problem that "access controls" are protected by the DMCA and Bill C-32?.....	9
Q: In order to enable new business models, I need legal protection for technical measures including access controls!.....	10
Q: Can you offer an example of a use of a technical measure that you would consider to be fair?.....	11
Q: Can you give real-world examples of an access control and a use control applied to content?.....	11
Q: Can you give real-world examples of a "copy control" that does not make use of an access control?.....	12
Q: Are there possible constitutional questions about technical measures in Copyright law?.....	13
Q: Is Canada obligated to add legal protection for technical measures into Copyright law in order to ratify the 1996 WIPO treaties?.....	13
Q: Did you previously claim I didn't need technical measures to protect my copyright related business?.....	14
Q: If DMCA style technical measures have already been US law since 1998, have there been problems?.....	14
Q: Did you just say DMCA style technical measures are more fair than C-32 style?.....	15
Q: At 66 pages, there must be more to this bill than WIPO treaty ratification?.....	16
Q: Shouldn't ISPs be held partly responsible for the activities of their customers?.....	16
Q: Aren't all the new education institutional exceptions to copyright great for students?.....	17
Q: Is the legalization of time and format shifting a critical improvement?.....	18
Q: What is wrong with photographers having the same rights as other copyright holders?.....	18
Q: Is this bill "technologically neutral" as desired by the government?.....	19
Q: Since there is a mandatory review every 5 years, does it matter if we make mistakes now?.....	19
Q: What do you think about the new exceptions for Interoperability of computer programs, encryption research and security?.....	19
Q: There are a number of copyright issues not covered in Bill C-32. Should they be added?.....	19
Q: What suggestions would you make for fair dealings reform?.....	20
Q: Should the Private Copying Regime for recorded music be expanded to devices?.....	20
Q: Can you clarify your proposal for monetizing non-commercial sharing of music online?.....	21
Q: Should the Private Copying Regime be expanded to all works covered by the copyright act?.....	22
Q: Heritage Minister James Moore said opponents to this bill come from two groups of radical extremists. Do you know who he is referring to?.....	22

Questions:

Q: *The government has indicated that C-32 offers a "balance between the interests of consumers and the rights of the creative community". Would you agree?*

I think the government is using an incorrect scale for determining whether the bill is balanced, given the suggested separation between the interests of creators and audiences is largely an illusion. All creators are audiences of more content than they are creators of, and nearly all creators build on the works of past creativity in their new creations. An increasing number of people who would have only been audiences in the past are now creating their own works, and the activities of amateur creators are as regulated by copyright as those of professional creators.

In some areas such as photography, amateur photographers and machine automated photography represents the vast majority of photographs, with professional photography representing a tiny fraction.

It is also very inappropriate to claim that the creative community have rights, and all other Canadian citizens only have interests.

As a creators' rights advocate actively involved in copyright policy since 2001, most of my discussions and nearly all disagreements have been with fellow creators or non-creator copyright holders⁶.

A more useful scale for determining whether a copyright bill were balanced is whether it protected the rights of all creators, past and current, amateur or professional, and not only historically successful copyright holding companies. With this scale I believe it is obvious that Bill C-32 is excessively tilted in favour of historically successful copyright holding intermediaries.

Q: *Many claim that Canadian Copyright is outdated. Is that true?*

Here are three interesting dates:

- 1996: WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT)⁷
- 1997: Most recently passed major overhaul of Canadian copyright (coincidentally also Bill C-32)⁸
- 1998: Most recently passed major overhaul of United States Copyright⁹ (AKA: US DMCA)

In other words, it is silly to suggest that US law is modern and Canadian law is antiquated, or that the WIPO treaties from 1996 automatically serve as a way to modernize Canadian law.

I agree that Copyright law, both domestically and internationally, is in need of modernization. I believe

⁶ Two articles are useful for illustrating this point. *Differentiating allies and opponents in the Copyright debate* <http://BillC32.ca/5162> and *Is there a copy left vs copy right?* <http://BillC32.ca/5182>

⁷ WIPO treaties on Copyright and Related Rights <http://wipo.int/copyright/en/treaties.htm>

⁸ Chronology of Canadian Copyright Law <http://www.digital-copyright.ca/chronology>

⁹ Amendments to Title 17 since 1976 <http://www.copyright.gov/title17/92preface.html>

this is why WIPO has been having meetings on Limitations and Exceptions¹⁰, the aspect of copyright that is most out of date. Some other countries and NGOs have been suggesting that Canada has been obstructionist towards this modernization.

Later treaties often modernize older treaties, and I fully expect to see a future WIPO treaty that removes "technical measures" from the two 1996 WIPO treaties, as well as adding clarity to Rights Management Information and Making Available rights. I also expect clarification on things such as "formalities" given we don't still ride horses to get around, and now live in the computer age. Registration and renewal is now trivial, and would facilitate additional licensing by making it easier to locate copyright holders.

Q: Is Canada obligated to ratify the WCT and WPPT?

Answer by Howard Knopf, Macera & Jarzyna LLP, on his personal blog¹¹

I have often said and been quoted on the principle that that signing a treaty is to ratification about the same as dating is to marriage. The latter does not necessarily follow from the former, and the influences on the relationship during the dating (i.e. signature) phase are, just as in person to person relationships, often defined more by influences other than legal "obligations." Let's just leave it at that.

WIPO currently administrates 6 Copyright related treaties¹², and I believe it is instructive to look at the dates when these treaties were ratified in the countries that influence us the most, and also whether they signed or ratified at all. Canada was under UK Copyright law until 1921¹³, so we were under Berne starting from 1887.

Berne Convention for the Protection of Literary and Artistic Works

164 contracting parties, up from 163 in 2008.

UK: December 5, 1887

France: December 5, 1887

Canada: April 10, 1928

United States: March 1, 1989

Brussels Convention Relating to the Distribution of Program-Carrying Signals Transmitted by Satellite

34 contracting parties, up from 30 in 2008.

UK: Didn't sign

France: Signed

Canada: Didn't sign

10 WIPO program activities, Copyright and related rights, Limitations and exceptions
<http://wipo.int/copyright/en/limitations/index.html>

11 Bio of Howard Knopf http://www.macerajarzyna.com/pages/h_knopf.htm, with this particular quote taken from <http://excesscopyright.blogspot.com/2008/02/canada-wipo-and-certian-obligations.html>

12 WIPO, Copyright and related rights <http://wipo.int/copyright/en/treaties.htm>

13 Chronology of Canadian Copyright Law <http://www.digital-copyright.ca/chronology>

United States: March 7, 1985

Geneva Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms

77 contracting parties, up from 76 in 2008.

UK: April 18, 1973

France: April 18, 1973

Canada: Signed

United States: March 10, 1974

Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations

91 contracting parties, up from 86 in 2008.

UK: May 18, 1964

France: July 3, 1987

Canada: June 4, 1998

United States: Didn't sign

WIPO Copyright Treaty (WCT)

88 contracting parties, up from 64 in 2008.

UK: March 14, 2010

France: March 14, 2010

Canada: Signed

United States: March 6, 2002

WIPO Performances and Phonograms Treaty (WPPT)

86 contracting parties, up from 62 in 2008.

UK: March 14, 2010

France: March 14, 2010

Canada: Signed

United States: May 20, 2002

I think it is clear that signing or not signing treaties and never ratifying is quite normal, even if we only narrowly look at WIPO copyright related treaties. There is no reason to consider these two treaties as any more important than others¹⁴.

Q: Is the ratification of the two 1996 WIPO treaties good for Canada?

Like Bill C-32 itself, the two WIPO treaties from 1996 are a mixed bag. They were rushed through, and

¹⁴ I offer additional commentary in a past article titled: *Copyright protesters got Industry Minister Jim Prentice's attention: now what?* <http://BillC32.ca/4509> from January 2008, just after the bill that later became C-61 wasn't tabled in December 2007.

some believe are the product of policy laundering¹⁵ from the United States. There was a minority position at the time of negotiations that was rejected at WIPO, but is still being pushed by some special interests (and implemented in C-32) that is inadequately understood by politicians and other policy makers (See answer on WIPO Guide).

There are many improvements to these treaties needed now that countries have had a chance to better understand the implications. Unfortunately, few countries have been willing to adequately stand up to the USA and some of its allies (which unfortunately appears to include Canada) which have stood as roadblocks in modernizing existing WIPO treaties or moving forward with new ones.

There are a few key issues which we need to watch carefully if Canada wishes to implement the treaties in a way that is beneficial to Canadians. I will reference the WCT article, even though similar language is used in WPPT as well.

- There are harmful and helpful interpretations of WCT Article 6 (right of distribution), Article 8 (Right of Communications to the Public) and Article 12 (Obligations concerning Rights Management Information). We need to ensure that the helpful interpretation is used in Canada.
- There are relatively harmless and greatly harmful interpretations of WCT Article 11 (Obligations concerning Technical Measures). This has been the focus of the debate, both at WIPO back in 1996 as well as each time legislation is tabled in any country. It should not be surprising that this is also the focus of debate in Canada each time legislation is tabled, or each time there is a consultation. It is critical to understand that legislating against "access controls", devices and services was rejected at WIPO in 1996.
- Concepts of "national treatment", where copyright holders in any WCT country need to be offered the same treatment as Canadian creators. This may impact things such as compulsory licensing schemes (IE: Private Copying Levy) as collectives outside of Canada will be able to request a cut as well. Canada may be forced to repeal this regime, or create a regime closer to the PLR (Public Lending Right) which is not part of copyright at all, but is a properly administered government program.

I offered a clause-by-clause commentary of the WCT¹⁶ in an article published in December 2007, prior to when we were told a copyright bill would be tabled.

Q: When discussing so-called "digital locks", what is the most important question we should be raising?

Whenever discussing locks of any type, the most important question to ask is who manages the keys.

Many believe that "digital locks" in the context of copyright will protect the interests of copyright holders, but in most cases the keys are managed by a technology platform provider. It is important to realize that locks will primarily benefit those who manage the relevant keys, and not necessarily protect the interests of the owner of what is locked. I have observed many creators changing their opinion on the legalization and legal protection of "digital locks" in copyright law once they had the opportunity to think about the question of who manages the keys.

¹⁵ Cory Doctorow gives lecture in London on Policy Laundering, Copyright and the Broadcast Flag <http://BillC32.ca/1014>

¹⁶ Why am I opposed to the upcoming Copyright bill even before I have seen it? <http://BillC32.ca/4386>

The copyright holder is only one of possibly 4 different owners whose interests are implicated by digital locks used in the context of copyright¹⁷. There is also the owner of media/medium, the owner of the information technology hardware, and the copyright holder of the software running in the hardware.

The most common use of a "digital lock" in the context of copyright includes a "digital lock" on content and a "digital lock" on the information technology that is authorized to access that content. In both cases it is not the owners who manage the keys, but the technology platform provider. In fact, in the case of the non-owner lock applied to technology the entire purpose is to lock the owner out of what they own.

Q: Are the technical measures provisions of Bill C-32 simply an implication of that section of the 1996 WIPO treaties?

The following excerpts are useful in answering this question.

WCT Article 11: Obligations concerning Technical Measures¹⁸

Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.

US Copyright Law (AKA: Digital Millennium Copyright Act - DMCA) § 1201. Circumvention of copyright protection systems¹⁹

(a) Violations Regarding Circumvention of Technological Measures. — (1)(A) No person shall circumvent a technological measure that effectively controls access to a work protected under this title.

Liberal Bill C-60²⁰, tabled June 20, 2005

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

Conservative Bill C-61²¹, tabled June 12, 2008, and Conservative Bill C-32²², tabled June 2, 2010 (Note: The definition in C-32 is mildly different in that it adds the word "protection" to define "technological protection measure"

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

17 Protecting Property rights in a digital world. <http://Flora.ca/own>

18 WIPO Copyright Treaty, Article 11 http://www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html#P87_12240

19 <http://www.copyright.gov/title17/92chap12.html#1201>

20 Links to text of bill maintained at <http://www.digital-copyright.ca/billc60>

21 Links to text of bill maintained at <http://www.digital-copyright.ca/billc61>

22 Links to text of bill maintained at <http://www.digital-copyright.ca/billc32> aka <http://BillC32.ca/>

(a) controls access to a work, to a performer's performance fixed in a sound recording or to a sound recording and whose use is authorized by the copyright owner; or

(b) restricts the doing — with respect to a work, to a performer's performance fixed in a sound recording or to a sound recording — of any act referred to in section 3, 15 or 18 and any act for which remuneration is payable under section 19.

Quick observations:

- The WIPO treaties protect activities which are already infringements under existing WIPO treaties
- The DMCA protects access controls, and is largely unconnected to activities which would otherwise be infringements.
- Liberal Bill C-60 is effectively a translation of the WIPO treaty language into Canadian Copyright law language
- The two Conservative bills bring in both the Liberal Bill C-60 (AKA: WIPO language) and a translation into Canadian law of the DMCA language.

This makes the two Conservative bills not only an implementation of the WIPO treaties, but of the most controversial aspect of the US DMCA. This should also explain why some people are calling this and the previous bill a "made worse in Canada" DMCA.²³

Q: Does the WIPO guide to treaties demand "access controls" and prohibitions on tools and services?

A few lobbyists²⁴ are suggesting that the two 1996 WIPO treaties demand "access controls" and a prohibition on tools and services that can be used to circumvent these access controls. They reference sections of the Guide to the copyright and related rights treaties administered by WIPO and glossary of copyright and related rights terms²⁵.

This guide was written by Dr. Mihály Ficsor²⁶ who was himself one of the few proponents of that specific policy position when the treaties were being negotiated. Even though most other delegations disagreed, and the treaties do not reflect his proposals, he and a few allies have continued to lobby countries to adopt his proposals rather than what the WIPO treaties actually say.

Documenting that history is a big part of Michael Geist's²⁷ chapter titled *The Case for Flexibility in Implementing the WIPO Internet Treaties: An Examination of the Anti-Circumvention Requirements*²⁸

23 See also: Michael Geist: Setting the Record Straight: 32 Questions and Answers on C-32's Digital Lock Provisions, Part One <http://www.michaelgeist.ca/content/view/5097/125/>

24 In Canada the two most vocal are McCarthy Tétrault colleagues James Gannon and Barry Sookman.

25 Guide to the copyright and related rights treaties administered by WIPO and glossary of copyright and related rights terms, ISBN:92-805-1200-2 <http://www.wipo.int/cgi-bin/koha/opac-detail.pl?bib=14057>

26 Biography at http://www.wipo.int/academy/en/meetings/iped_sym_05/cv/ficsor.html

27 Michael Geist maintains a personal website at <http://www.michaelgeist.ca/>

28 Online version of the chapter is available for free via <http://www.irwinlaw.com/pages/content-commons/the-case-for-flexibility-in-implementing-the-wipo-internet-treaties--an-examination-of-the-anti-circumvention-requirements---michael-geist>

of the book *From "Radical Extremism" to "Balanced Copyright": Canadian Copyright and the Digital Agenda*²⁹.

It is critical that parliamentarians and others realize that what countries agreed to is what the WIPO treaties say, not what any individual claims it says. The delegations to WIPO, including Canada, clearly rejected the position put forth by Ficsor.

It may not surprise those who follow these global political issues that Mr. Ficsor has been a consultant³⁰ and at time staff at the so-called International Intellectual Property Alliance (IIPA)³¹.

This is the special interest group largely behind Canada being added to the USTR's Special-301 report. This report can be seen as the source of the false claim that Canada's Copyright is in need of radical reform -- and must be reformed in the ways promoted by IIPA.

Q: Why is it a problem that "access controls" are protected by the DMCA and Bill C-32?

In its definition, Copyright is a series of activities which if done require the permission of the copyright holder. Some very specific activities have exceptions where permission is not needed, only a payment, as defined by a compulsory licensing system. There are other exceptions to listed activities that are still allowed without permission or payment, as documented under Fair Dealings. Other unlisted activities are not regulated by copyright at all.

In Canada, these activities are listed in section 3 for most works, section 15 and 26 for a performer's performance, section 18 for sound recordings, and section 21 for a communications signal. You will notice that the language of the recent bills list "section 3, 15 or 18 and any act for which remuneration is payable under section 19", referencing some of those activities.

Since the origins of copyright, the concept of "access" to a work has never been a copyright listed activity³². All the activities are things which you need to already have access to the work in order to do. The concept of access has always been left to other laws.

If you jump a gate and watch a movie without paying, you are not accused of copyright infringement, but trespass. The same is true of commerce (electronic or otherwise), where the concept of access to something you would purchase (copyrighted works or anything else) isn't governed by copyright law, but by other laws such as e-commerce and property law. If you walk out of a book store with a physical

29 Published: October 2010, ISBN-13: 978-1-55221-204-2 <http://www.irwinlaw.com/store/product/666/from--radical-extremism--to--balanced-copyright->

30 See bio from IIPA website http://www.iipa.com/pdf/IIPA_MF_bio_080204.pdf

31 Information on this organization can be seen at <http://www.iipa.com/>. While they have recently removed information about Ficsor, he was listed as staff in 2003 <http://web.archive.org/web/20030625040144/http://www.iipa.com/personnel.html> through 2008 <http://web.archive.org/web/20080412061108/http://www.iipa.com/personnel.html>.

32 This point was also made by Osgood Hall Professor David Vaver http://www.osgoode.yorku.ca/faculty/Vaver_David.html in *Digital Locks, Circumvention and The Copyright Reforms Proposed By Bill C-32*. <http://www.iposgoode.ca/2010/11/digital-locks-circumvention-and-the-copyright-reforms-proposed-by-bill-c-32/>

book without paying for it, it really is theft and not copyright infringement.

One of the laws intimately related to copyright law is contract law. If you go to court for violating an End User License Agreement (EULA), the court doesn't presume that you infringed copyright. There are many scenarios that are possible, including clauses of the EULA being struck down, the defendant being found in breach of contract, to the defendant being found guilty of copyright infringement, or combinations. It would be harmful to all parties if the balance of both copyright law and contract law was circumvented by suggesting that any unauthorized access to a work, or use of that work, was automatically an infringement.

If you think about it, if the concept of "access" is imported into copyright law, it makes nearly every other aspect of the law redundant. Copyright holders simply need to grant permission to access under any conditions they want, denying otherwise, and can rewrite any aspect of copyright law in those contracts. Without permission to access the content, none of the limitations or exceptions to copyright can exist.

I believe Canada must firmly reject adding the concept of "access" or "access controls" to Canadian Copyright law, thus preserving the traditional definition of Copyright.

Q: In order to enable new business models, I need legal protection for technical measures including access controls!

Whether this is true would make for an interesting debate, but that debate isn't critical for this answer.

The question isn't whether there should be legal protection for technical measures including access controls in Canadian law, but whether the Canadian *Copyright Act* is the right law to be changing.

If a technical measure is protecting contracting terms, including a copyright license agreement, then the legal protection should be in provincial contract law.

If a technical measure is protecting electronic commerce, then the legal protection should be in provincial e-commerce law.

And so on...

None of the justifications I have heard for legal protections for technical measures justify their addition to copyright law, but they quite often suggest a need to modernize various other laws to appropriately protect technical measures as they protect aspects of those laws. There is never a justification to allow a technical measure to circumvent the contours of any of the laws, which is something we always need to be careful of. We need to ensure that all the existing checks and balances in Canadian law are preserved as we add any legal protection for technical measures.

Q: Can you offer an example of a use of a technical measure that you would consider to be fair?

While I am a technical person, I believe that fairness is determined by how the law regulates relationships between different parties and not a matter of technology. In my opinion, nearly every use of technology can be made fair by properly disclosing the correct relationship and ensuring that existing legal concepts are able to ensure fairness in these relationships.

The technology used by digital cable and satellite services is one example. While there is hardware (a digital tuner) that is intended to be in the premises of the customer, the cable/satellite company wishes to retain the keys to all digital locks contained within the device. Given who manages the keys, it should be obvious that this should be treated as a rental arrangement. We have provincial acts and agencies to ensure that the relationships between landlord and tenants are fair, and the same type of regulation would be necessary in the case of communications technology possessed by one person but where the keys are kept by someone else.

I consider it inherently dishonest and unfair to claim that technical measures are a matter of copyright law, and copyright law alone. This would allow the people holding the keys to digital locks to circumvent the contours of existing laws including contract, e-commerce, property, privacy, competition, consumer protection, trade and even copyright. We need to ensure that the fairness in law that we have put in place over hundreds of years is retained in the digital world, especially in the presence of widely misunderstood digital locks.

Q: Can you give real-world examples of an access control and a use control applied to content?

Since Bill C-32 protects both use controls and access controls, it would be instructive to give an example of each. This is critically important given many lawyers have demonstrated³³ that they are uncertain about the difference.

Access Control

The encryption on DVD movies is a simple real world example of an access control, where the relevant decryption keys are embedded within the hardware/software used to access encrypted DVDs. This access control is used to protect complex contractual arrangements between the manufacturers of DVD videos and the manufacturers/authors of DVD accessing hardware and software. The organization managing this set of contracts and access controls calls itself the DVD Copy Control Association, but calling oneself a copy control association does not define the technology as a copy control or a use control.

Use Control

³³ I included an example of a misinterpretation or misdirection of C-32 by McCarthy Tétrauld LLP lawyer Barry Sookman in an article in the November 15th, 2010 issue of The Hill Times. <http://BillC32.ca/5248>

It is a common situation for less technical people to confuse "access controls" and "use controls" when trying to apply to real-world examples of technology. This is a critical problem when some of the most vocal Canadian proponents of the Ficsor interpretation of the 1996 WIPO treaties are unable to consistently and accurately differentiate.

This is a trick question. A use control involves being able to make a decision in relation to the specific activity. Digital content alone can not make decisions any more than a paperback book is capable of reading itself out loud. Digital content can include meta-data to advise something else on how to handle it, but it cannot itself make decisions or otherwise impact usage.

The decision making rules of a use control technical measure will be encoded in software, and run on some computing hardware. Analyzing a use control involves analyzing all the technological components, the relationships between the various owners of these components³⁴, and the relevant laws describing the relationships between these parties.

Q: Can you give real-world examples of a "copy control" that does not make use of an access control?

"Copy control" is a term used by lawyers and marketing people, and is a description of an alleged intent and not a description of technology. Analyzing the impacts of C-32 in real-world scenarios requires analyzing what technologies are being used in a "copy control".

I have been analyzing things called "copy control" for nearly three decades, and have noticed only two techniques being used: media defects and access controls.

Media defects

An example is the Macrovision system applied to the outputs of VCR's. The video output deliberately violates video specifications in ways that would theoretically be corrected by a television, but would cause problems for someone trying to record that signal with another VCR. Correcting this defect involved using time-base correction (TBC). TBC is commonly used in video production and editing. When I worked at a computer dealer in the late 1980's we stocked TBC hardware given we sold the Amiga Video Toaster, and the multiple inputs to this device required TBC in order to be synchronized to allow fades between different video.

Other examples from the 1980's included software on floppy disks with tiny laser holes in them. The software would read that part of the disk to detect if the hole was present, otherwise it would consider the floppy to be an unauthorized copy.

In the late 1990's and early 2000's there were various media defects applied to Audio CD's that violated the Red Book audio Compact Disc standard. The defects were intended to be ignored by simple CD players, but would behave differently in CD-ROM drives or some of the common software and operating systems that run on desktop PC's. Many of these defects were dependant on Microsoft Windows, and had no impact on users of competing operating system.

This technique fell out of use as they commonly had both false positives (would treat legitimate scenario as infringement) as well as false negatives (would treat infringing scenario as legitimate). These techniques annoyed paying customers far more than it deterred infringement, likely leading to revenue loss.

³⁴ The primer I use in presentations to discuss real-world technical measures, the various components, and the various owners of these components is titled: *Protecting Property Rights in a digital world* <http://flora.ca/own>

Q: Are there possible constitutional questions about technical measures in Copyright law?

University of Ottawa law professor Jeremy deBeer conducted a detailed analysis in an article titled *Constitutional Jurisdiction Over Paracopyright Laws*³⁵, which was a chapter in an Irwin Law book titled *In the Public Interest: The Future of Canadian Copyright Law*³⁶.

Similar arguments were made in the *Journal of Information Law and Technology* by Professor Emir Aly Crowne-Mohammed and Yonatan Rozenszajn³⁷, both from the University of Windsor.

The DRM provisions of Bill C-61 represent a poorly veiled attempt by the Government to strengthen the contractual rights available to copyright owners, in the guise of copyright reform and the implementation of Canada's international obligations. Future iterations of Bill C-61 that do not take the fair dealing provisions of the *Copyright Act* (and the overall scheme of the Act) into account would also likely fail constitutional scrutiny.

I have written members of the Ontario provincial government, including my MPP, about this issue³⁸.

Q: Is Canada obligated to add legal protection for technical measures into Copyright law in order to ratify the 1996 WIPO treaties?

The most politically easy way to implement the treaties would be to use the Bill C-60 language, which was a translation of the WIPO treaty language into Canadian Copyright law. We are left with Canadian law that has the same lack of clarity that exists with the outdated 1996 WIPO treaties.

We have other options that we could pursue that would lead to far better law.

The concept of Moral Rights (To claim authorship; to object to certain modifications and other derogatory actions) is part of the Berne convention. While the United States ratified this treaty in 1989, it does not completely recognize moral rights as part of copyright law, but rather as part of other bodies of law such as defamation or unfair competition.

The same concept could be used in Canada where technical measures would be protected under contract, e-commerce and property law, rather than in Copyright law. This would offer considerably more certainty in the law, rather than the confusion that exists around technical measures in Copyright law.

Since these are areas of provincial responsibility, the process would become similar to what happened with the European Union. The Federal government would draft sample language that would then be debated and passed in each province. Once every province and territory passed adequate legislation,

35 This chapter is available free at <http://www.irwinlaw.com/pages/content-commons/constitutional-jurisdiction-over-paracopy-laws---jeremy-f-debeer>

36 Published 2005 by Irwin Law Inc. ISBN: 1-55221-113-4 . More information online at <http://www.irwinlaw.com/store/product/120/in-the-public-interest--the-future-of-canadian-copyright-law>

37 DRM Roll Please: Is Digital Rights Management Legislation Unconstitutional in Canada? http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2009_2/cmr

38 Federal Bill C-32 tramples areas of provincial jurisdiction <http://BillC32.ca/5156>

Canada as a whole would then ratify the two 1996 WIPO treaties.

Q: Did you previously claim I didn't need technical measures to protect my copyright related business?

Many copyright holders point to the rise in the use of new communications technologies like the Internet as being the source of all their problems. Along with these new technologies came various technical measures that were marketed to copyright holders, some which are helpful and some which are very harmful to the interests of copyright holders. Most of the statistics used to indicate losses do not differentiate between losses due to infringement and losses due to unintended consequences from misunderstood and misapplied technical measures.

I make this observation primarily an author and commercial support person for independent software. I am also a Canadian who wants to be given as many opportunities as possible to legally acquire and (when requested) pay for content created by others, noting that far too often the copyrighted works I wish to acquire are not made legally available to me either as a Canadian, or under reasonable terms.

My advice to fellow copyright holders is to spend the time it takes to learn the basics of technical measures³⁹, including key components such as cryptography and steganography. That way you will be able to differentiate between technologies that will help your business, and those that will only harm. You will also learn to better understand which legal constructs these technical measures are protecting, and won't confuse a technical measure protecting contract with one that protects e-commerce or some other law⁴⁰.

Q: If DMCA style technical measures have already been US law since 1998, have there been problems?

The US based Electronic Frontier Foundation maintains documentation of many of the problems⁴¹.

There are many differences between US and Canadian law that mean the US experience under the DMCA will not mirror the Canadian experience under Bill C-32.

- US law was never as tilted in favour of past copyright holders as Canadian law prior to implementing their DMCA. Some people use the word "stronger" to refer to this tilt in the balance. After C-32, Canadian law will be even further tilted in favour of past copyright holders compared to US law.
- US law includes a flexible Fair Use regime which allows the courts to interpret specific situations to confirm socially beneficial activities that do not unduly harm the interests of copyright holders to be outside of Copyright. This allowed the US courts to confirm the legality of things such as time shifting, something currently illegal in Canada. The USA does not need to

39 I recommend my primer **Protecting property rights in a digital world** <http://Flora.ca/own> as a good start.

40 For further reading, see *If lawyers are confusing copyright with other laws, what about the rest of us?* <http://BillC32.ca/5176> where I discuss statements by lobbyist Barry Sookman trying to conflate copyright and other areas of law.

41 Unintended Consequences: Twelve Years under the DMCA <https://www.eff.org/wp/unintended-consequences-under-dmca>

pass a new law every time a new technology comes along, unlike C-32 that contains a lot of minutia.

- The DMCA does not make any aspect of their Fair Use regime subservient to technical measures, making the DMCA closer to the intent of the 1996 WIPO treaties to tie technical measures to infringing activities than C-32.

Canada would have far more balanced legislation if it adopted US law in its entirety, rather than passing Bill C-32 without considerable amendments.

Q: Did you just say DMCA style technical measures are more fair than C-32 style?

The most obvious feature of Bill C-32 style technical measures, beyond the fact that it incorporates both WIPO use technical measures and US "access control", is that many of the new limited fair dealings rules are very explicitly made subservient to the use of technical measures.

Examples:

- 29.22 (1)(c) Reproduction for private purposes
- 29.23 (1)(b) Reproduction for later listening or viewing
- 29.24 (1)(c) Backup copies
- 30.04 (3) and 30.04(4)(a) Educational use of Work available through Internet

Contrast this with the US DMCA which, after defining access control technical measures in Title 17, § 1201⁴², includes the following:

(c) Other Rights, Etc., Not Affected. — (1) Nothing in this section shall affect rights, remedies, limitations, or defenses to copyright infringement, including fair use, under this title.

(2) Nothing in this section shall enlarge or diminish vicarious or contributory liability for copyright infringement in connection with any technology, product, service, device, component, or part thereof.

(3) Nothing in this section shall require that the design of, or design and selection of parts and components for, a consumer electronics, telecommunications, or computing product provide for a response to any particular technological measure, so long as such part or component, or the product in which such part or component is integrated, does not otherwise fall within the prohibitions of subsection (a)(2) or (b)(1).

(4) Nothing in this section shall enlarge or diminish any rights of free speech or the press for activities using consumer electronics, telecommunications, or computing products.

⁴² <http://www.copyright.gov/title17/92chap12.html>

In other words, under the USA DMCA, access control technical measures are subservient to their flexible Fair Use regime. Under C-32 not only is our Fair Dealings regime not flexible and is far weaker than the US regime, many of the few provisions we are offered are subservient to technical measures.

The USA DMCA doesn't protect fairness in the way that the Brazilian proposal⁴³ does which establishes equivalent penalties for hindering or preventing the users from exercising their fair dealing rights, but the US DMCA is far more balanced than Bill C-32.

Q: At 66 pages, there must be more to this bill than WIPO treaty ratification?

The summary from the bill lists the following general areas:

- a. update the rights and protections of copyright owners to better address the challenges and opportunities of the Internet, so as to be in line with international standards;
- b. clarify Internet service providers' liability and make the enabling of online copyright infringement itself an infringement of copyright;
- c. permit businesses, educators and libraries to make greater use of copyright material in digital form;
- d. allow educators and students to make greater use of copyright material;
- e. permit certain uses of copyright material by consumers;
- f. give photographers the same rights as other creators;
- g. ensure that it remains technologically neutral; and
- h. mandate its review by Parliament every five years.

Unfortunately, following the United States and adding "access controls" to Copyright law is seen by many as such an extreme measure that we feel unable to talk about other aspects of the bill without distracting from what we consider the most problematic part. If we knew that this section would be fixed, we could focus our attention on other aspects of the bill.

With that said, we can continue with answers to questions about other aspects of the bill.

Q: Shouldn't ISPs be held partly responsible for the activities of their customers?

Internet Access Providers (IAP) should be considered "dumb pipes" and not responsible for anything other than communication (electronic or otherwise) with their clients, and responding to court orders for information. They should be no more responsible for the contents of the traffic over those pipes than a municipality is for the traffic over the roads they manage. If the transportation system is abused in the committing of a crime, we would hold the drivers and car owners responsible, not those who build and maintain the roads.

⁴³ Brazil's Approach on Anti-Circumvention: Penalties For Hindering Fair Dealing
<http://www.michaelgeist.ca/content/view/5180/125/>

There are times when an entity that is providing access is also carrying out activities that can be considered publishing, communicating by telecommunications, or even broadcasting. It is important that we regulate these activities and not simply the entities that happen to be carrying out those activities. If a company offers IAP, telephone, Broadcasting and BDU (Broadcast Distribution Undertaking, such as a Cable or Satellite company) services, then each activity should be regulated independently. Where we would need to look at the company as a whole is in areas of law such as competition policy, not Copyright.

It should be obvious that there are times when IAPs are needed as communication intermediaries for more than just transporting packets. If a copyright holder believes that material communicated by a client is infringing, and the identity of the client is not known, then the IAP should be mandated to communicate any messages between the copyright holder and the client towards resolving any conflict. This is the essence of the Notice-and-Notice system set out in Bill C-32, and it is an appropriate response to that particular problem. It may be appropriate to provide clarity that such a communication service is not needed in the case when the identity of the client is known, and it should not be allowed to be abused as a form of "denial of service" attack against IAPs by dishonest organizations claiming to represent copyright holders.

Our federal Privacy legislation, PIPEDA, demands that IAPs keep their client identity private unless that information is demanded as part of a court order. This balance of the relevant interests should be maintained in our privacy law.

Q: Aren't all the new education institutional exceptions to copyright great for students?

I consider education institutional exceptions to copyright to be a government program, paid for on the backs of copyright holders, masquerading as copyright. Public education programs should be paid for out of general tax revenue, and managed by provincial governments. Inadequate funding for educational resources is an educational sector issue, has market based solutions (IE: Open Access publication), and is not a "copyright" issue.

I am very uncomfortable with having special rules that apply to educational institutions. This feels like mis-education to me, and harms our children's ability to interact in a lawful matter outside of that classroom and later in life. I consider copyright rules that are focused on institutions rather than students to be harmful to students.

Fair Dealings should be expanded to include phrases such as "including multiple copies for classroom use" as is done in the USA to clarify that educators can step into the shoes of students and do things which the students would be allowed to do alone. With that necessary clarification the education institutional exceptions to Copyright, as well as the related clauses in the bill, could be repealed.

This commentary applies equally to current Bill C-32 language, as well as the Access Copyright proposals to impose a compulsory license.

Q: Is the legalization of time and format shifting a critical improvement?

Lets put these in context. The government is legalizing activities Canadians already thought were legal, and were going to do anyway regardless of what the copyright law said. No copyright holder was ever going to sue someone based on these activities, as it would draw attention to the public of the unbalanced nature of existing Canadian copyright law. This change in the law will not change any behaviour, and is written in such a convoluted way that it may in fact induce infringing behaviour that will be brought to court.

In the United States, with their flexible Fair Use regime, they never needed this level of complexity or minutia to be added to their Copyright act. When there was a court case involving some of these activities back in the early 1980's with the introduction of the VCR, their courts were able to clarify time shifting as always having been allowed in their existing Copyright act.

It appears to me that these sections were added for purely political purposes, to appear more balanced, and won't make any positive change to how citizens behave or how copyright law is understood in Canada.

Q: What is wrong with photographers having the same rights as other copyright holders?

There really is no such things as "the same rights" in copyright. The impact of how copyright regulates activities is fully dependant on the nature of the copyrightable work, the motivations of the creators, and many other factors.

Take visual art for instance. Copyright thus far has been focused on rent-seeking behaviour, and works well for creativity that is copied many times and/or communicated to many people, with each audience member paying a small royalty fee. Contrast this with visual art which often only has one instance and is not copied or communicated. For these people, the absence of *droit de suite* in Canadian law is critical, and current copyright law doesn't offer them much at all.

Photography is an example of recording which is sometimes an activity carried out by an artist, but is most often carried out by an amateur or even done automatically by technology. Who is the copyright holder of the video taken by a security camera? What about that common scenario where a tourist asks someone to take their picture⁴⁴ on their camera?

It should be clear that the scenario where a professional photographer uses someone else's equipment is an insignificant consideration, while the scenario where the owner of the camera equipment and medium is the most logical copyright holder is the norm. Current copyright law handles that majority situation in section 10, even if the terminology needed to be modernized given many cameras don't have a "negative or other plate". Bill C-32 repeals that section and considers only the relatively insignificant situation of artists using someone else's camera equipment.

I believe that modernizing copyright would have involved harmonizing all recordings (photographs, video, audio) with the existing section 10, rather than heading the opposite direction.

⁴⁴ The picture that may never again be possible <http://www.flora.ca/documents/puja-picture.html>

Q: Is this bill "technologically neutral" as desired by the government?

Hey, I thought you asked me to stop talking about access controls? At least the comical reference to the videocassette from Bill C-61 is gone.

The mention of "access controls" is clearly not technologically neutral as it discusses a specific use of a specific type of technology by copyright holders, rather than talking about specific activities which require the permission of a copyright holder (traditional definition of copyright). That access controls seek to protect legal constructs such as contracts and e-commerce only suggests further that it should not be mentioned in Copyright law. There are various sections of C-32 which are obvious promotion of technical measures, and some (such as relating to library loaning) that have been interpreted as promoting specific technology.

Q: Since there is a mandatory review every 5 years, does it matter if we make mistakes now?

This is not a review by an external body such as the copyright board or the departments, but a review by a committee of the Senate, House, or both. Copyright is a lose-lose topic for politicians, and they will try to minimize any conversations. This is why we have seen massive omnibus bills every decade rather than reasonable sized smaller bills that deal with individual topics.

Q: What do you think about the new exceptions for Interoperability of computer programs, encryption research and security?

The replacements to the existing 30.6 are largely only needed because of the addition of legal protection for technical measures, especially access controls, and the lack of a flexible Fair Use regime in Canada. The activities that people would need to do for interoperability, security and encryption research were not greatly hampered in the past.

If these clauses were being proposed outside the context of technical measures, this clause would have been an improvement.

For a good example of policy that protects interoperability, please see the European Union directive for computer programs⁴⁵.

Q: There are a number of copyright issues not covered in Bill C-32. Should they be added?

Bill C-32 is excessively complex and runs for more than 60 pages. Many of its clauses are widely misunderstood by lobbyist, lawyers, politicians, and the general public. With so many issues included, it is impossible to have any reasonable conversation about the bill as a whole. Only tiny portions of the bill will receive adequate treatment at committee.

⁴⁵ Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31991L0250:EN:HTML>

If Canada wanted to push forward with modernization of copyright that benefited Canadians, rather than simply trying to get it off of the agenda, they would be tabling a larger number of smaller bills rather than a tiny number of omnibus bills. The two 1996 WIPO treaties are complex with a lot of international legislative history to understand, and their implementation is deserving of a bill that is debated entirely separate from any other copyright issues.

After meeting Pablo Rodriguez, MP for the Quebec riding of Honoré-Mercier, and the Heritage critic for the Liberal party, I wrote an article⁴⁶ detailing the suggestion that Bill C-32 should be renamed the "The 1996 WIPO treaty implementation act", removing anything not related to those two treaties, and table separate bills for these separate issues.

The bill was sent to committee after passing second reading rather than before. This suggests that while we can't fix C-32 to be a 1996 WIPO implementation bill, it at least won't in theory have these other separate issues added to it.

Q: What suggestions would you make for fair dealings reform?

The Fair Dealings proposals in Bill C-32 are unnecessarily complex, and will be out-of-date the moment the bill is passed. It is also quite likely that their complexity will lead to an increase in inadvertent infringement, yet another harmful unintended consequence from this excessively complex bill.

I believe we should be taking the lead from the United States in how their much simpler and easier to understand Fair Use regime works. One suggestion is to simply adopt the US language, providing both clarity and balance that is lacking in current Canadian law -- a problem made far worse with C-32.

A "made in Canada" proposal would be to do what the United States did, but use Canadian language. They set up a non-exhaustive list of categories that might qualify as fair uses, and then added to the copyright act the criteria use by the courts to determine fairness.

In Canada we would retain the C-32 expanded set of criteria, using the phrase "such as" so that it is clear that this is a set of examples and not an exhaustive list.

The Supreme Court of Canada has identified six non-exhaustive factors to assist a court in determining whether a specific use is fair: (1) the purpose of the dealing; (2) the character of the dealing; (3) the amount of the dealing; (4) alternatives to the dealing; (5) the nature of the work; and (6) the effect of the dealing on the work. These factors should be added to the Copyright Act for additional clarity.

Q: Should the Private Copying Regime for recorded music be expanded to devices?

At first glance the theory seems sound. When the Private Copying regime was introduced in 1997 it was common to store music on more permanent storage media such as CDs and magnetic tape. Thirteen years later the technology has changed, and thus what the levy is applied to should change

46 What if I was the Bill C-32 lead from the Official Opposition Liberals? <http://BillC32.ca/5220>

with it.

I believe the Private Copying regime has been a failure. It is widely misunderstood by lobbyist, lawyers, politicians, and the general public. Most people don't realize this compulsory license legalized activities in exchange for the levy, and for a wide variety of reasons (some quite legitimate) it is confused with a tax⁴⁷.

I believe that the Private Copying regime is yet another government program trying to masquerade as copyright. If you speak to musicians they would be happier with stable funding for programs such as FACTOR⁴⁸ than the small amount of money they receive from the CPCC. If you talk to the general public, some of the same people who find the private copying levy offensive are strong supporter of arts funding. Listening to politicians talk about the Private Copying regime, they nearly always speak about it as if it was an arts program rather than copyright.

I believe the solution is for politicians to provide stable funding to properly managed arts funding programs, and stop trying to add these programs to the Copyright Act. The CPCC should be abolished, replaced with an agency for recorded music similar to the Public Lending Right Commission⁴⁹. Truly private activities such as time and device shifting, the creation of "mixed tapes" that are not distributed to someone else, and such from lawfully acquired recorded music should be carved out of copyright with an clear and easy to understand exemption.

Q: Can you clarify your proposal for monetizing non-commercial sharing of music online?

While I believe the Private Copying regime has been a failure, I feel there is a need for a compulsory licensing system for public activities such as non-commercial P2P distribution of music⁵⁰.

We have many forms of music distribution (streaming, P2P, etc) where composers and most performers wish to license under reasonable terms, but the major recording labels are refusing reasonable licensing.

Section 19 of the *Canadian Copyright Act* is a compulsory license applied to neighbouring rights holders (performers and makers of sound recordings) that applies to communication to the public by telecommunications (i.e. commercial radio). I believe this compulsory regime should be updated to clarify that P2P is an on-demand communication to the public, and be expanded to include non-commercial distribution (IE: mixed CDs or USB sticks given to other people). This regime doesn't apply to composers, who have shown a willingness and eagerness to license their music in appropriate ways. This proposal is compatible in most respects with the proposal from the Songwriters Association of Canada⁵¹, but far simpler as it is an expansion of an existing compulsory license regime.

ISPs could expand their services by collecting and paying this levy on behalf of their clients.

47 Is the private copying levy a tax? <http://BillC32.ca/5237>

48 The Foundation Assisting Canadian Talent on Recordings (FACTOR) <http://factor.ca/>

49 "Providing payments to Canadian authors for the presence of their books in public libraries" <http://www.plr-dpp.ca/>

50 I wrote two articles that may be helpful in understanding this issue: *Analyzing when copyright levies are a good idea, and when they are a very bad idea.* <http://BillC32.ca/4515> and *Is the private copying levy a tax?* <http://BillC32.ca/5237>

51 Proposal from the Songwriters Association of Canada <http://www.songwriters.ca/proposalsummary.aspx>

Q: Should the Private Copying Regime be expanded to all works covered by the copyright act?

Compulsory licensing schemes need to be understood as an exception to copyright, and thus must have the 3-step test applied. The 3-step test is part of Berne convention, and articulated in Article 13 of TRIPs as: "Members shall confine limitations and exceptions to exclusive rights to **certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the rights holder.**"

While this test has been inconsistently applied by only applying in the zero-royalty exception scenario, it should be clear that this proposed expansion of the private copying exception would fail this test⁵².

Q: Heritage Minister James Moore said opponents to this bill come from two groups of radical extremists. Do you know who he is referring to?

If anyone hasn't heard the comments, there is a video available from IT World Canada⁵³. I have to admit that I'm not certain who the comments were referencing, although some people thought he was thinking of Michael Geist who is neither radical nor extreme.

There are some ideas which I consider to be radical or extreme.

- There are anonymous online comments that call for the abolishing of copyright, but I have never seen an organized group of definable citizens advocating that position with any level of seriousness. If such a position were to ever organize, I would consider it radical and extreme.
- The Pirate Party of Canada suggests that they, "want to adjust copyright for consumers to make private, non-commercial copying of content legal"⁵⁴. I suspect many would consider that fairly radical, although not extreme. Many US citizens believe that their existing flexible Fair Use regime works this way, and they act as if it worked this way, even if not all US copyright lawyers would agree. Canadians have been lied to and told that US Copyright law is "stronger" than Canadian Copyright law, so quite validly (but incorrectly) believe that copyright related activities that are lawful in the USA must be lawful in Canada.
- The self-called Creators Copyright Coalition have proposed an "expansion of the private copying regime to include all categories of work covered by the Copyright Act"⁵⁵. I consider this to be more radical than the policies promoted by the Pirate Party, and in my evaluation more harmful to the interests of creators⁵⁶.
- Several groups are advocating that the traditional definitions and contours of Copyright have an "opt out" for copyright holders who can digitally encode their copyrighted work and apply an "access control" technical measure. While I consider this to be both radical and extreme, I am pretty certain the Minister was not talking about people holding this view as he seems to be one of them.

52 Analyzing when copyright levies are a good idea, and when they are a very bad idea. <http://BillC32.ca/4515>

53 Moore calls copyright critics 'radical extremists' <http://www.itbusiness.ca/it/client/en/home/News.asp?id=58123>

54 About the Pirate Party of Canada <https://www.pirateparty.ca/about>

55 Creators' Copyright Coalition, Platform on the Revision of Copyright, January 2008
<http://www.creatorscopyright.ca/documents/platform-jan08.html#private-copying>

56 Analyzing when copyright levies are a good idea, and when they are a very bad idea. <http://BillC32.ca/4515>