Brief to Legislative Committee on Bill C-11

by Russell McOrmond [1]

"**It's very important to remember that it's your intellectual property**[2] **-- it's not your computer**. And in the pursuit of protection of intellectual property, it's important not to defeat or undermine the security measures that people need to adopt in these days."

- Stewart Baker, then US Department of Homeland Security's assistant secretary for policy[3]

Introduction

I participated in the C-32 committee through a brief[4] and through an intervention on March 8, 2011[5]. This brief is being submitted to clarify answers to questions asked by MPs, and to ensure that the interests of technology owners are recognized as an important stakeholder group in the debate on the "technological measures" aspects of Bill C-11.

Copyright is often said to require a balance between the rights and interests of copyright holders and the rights and interests of users of copyrighted works. While this set of interests may be appropriate to discuss for the Copyright component of Bill C-11, it is inappropriate for the Paracopyright[6] component.

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[1] Full contact information at http://flora.ca/#contact

[2] The term "intellectual property" can lead to confusion, so should be avoided when possible. I discussed that in my intervention in front of the Bill C-32 committee in response to a question. It is included in the GNU project's "Words to Avoid (or Use with Care) Because They Are Loaded or Confusing" page at http://www.gnu.org/philosophy/words-to-avoid.html#IntellectualProperty

[3] Comments widely reported in the media of a U.S. Chamber of Commerce-sponsored event in 2005. The context was discussion of Sony DRM on widely distributed music CDs which infected many computers and opened additional security vulnerabilities. http://c11.ca/1211

[4] Brief available at http://www.flora.ca/documents/BillC32-mcormond-201101-brief.pdf (PDF format) and http://www.flora.ca/documents/BillC32-mcormond-201101-brief.odt (OpenDocument format)

[5] Bill C-32 legislative committee Meeting 17 http://www.parl.gc.ca/CommitteeBusiness/CommitteeMeetings.aspx?Cmte=CC32&Language=E&Mode=1&Parl=40&Ses=3#DT20110308CC32MEE17 , which has accompanying minutes, transcripts, and audio-video recordings.

[6] A longer discussion of Paracopyright can be read at http://en.wikipedia.org/wiki/Paracopyright , which speaks of "a term that refers to an umbrella of legal protections above and beyond traditional copyright."

Paracopyright policy is seen in the form of legal protection for "technological protection measures" as will be defined in section 41 of the new act as modified by Bill C-11, and all the other sections which make reference to that section.

Digitally-encoded content can't make decisions any more than a paperback book is capable of reading itself out loud. If there are any rules to be enforced, including whether a work can be copied, they are encoded in software which runs on some device. Understanding the real-world market and human rights impacts of these technologies requires understanding all the components, and the rights and interests of all relevant classes of owners.

The rights and interests of software authors, as well as any potential conflicts of interests these authors may have with respect to their competitors, must be recognized. As currently drafted, Bill C-11 can (and most likely will) be abused by specific software vendors in anti-competitive ways that harm their competitors and the otherwise free market for computer software.

The rights and interests of the owners of the devices must be recognized, but has thus far been ignored by Bill C-11 and nearly all the debate within parliament and committee on the bill. As currently drafted, Bill C-11 can (and most likely will) be abused to infringe the rights of technology owners.

I am a software author and computer owner. Before copyright can offer me anything as a copyright holder for software, I must know that fellow computer owners can make their own software choices. If they can't make their own software choices then they may be denied the right to choose my software, something that will be far more harmful to software authors and computer owners than copyright infringement can be to copyright holders.

Proposed Amendments to Bill C-11

The 1996 WIPO treaties require some form of Paracopyright in order to ratify, but offer considerable flexibility[7]. It is possible to ratify the two 1996 WIPO treaties in a way that causes a minimum of harm to the legitimate rights and interests of technology owners. The following amendments to Bill C-11 are focused on the Paracopyright aspects of the bill.

- Remove "access control" technological measures (part a) from the definition of technological measures, as well as removing all other references from the bill to that part of definition[8].
- Tie "use control" technological measures (part b in definition) to infringing purposes through adding clarifying language, as well as removing limits on fair dealings which reference technological measures[9].
- Clarify that legal protection only applies to technological measures applied to copyrighted content, and authorized by the copyright holder. Legal protection in the federal Copyright Act should not apply to technological measures applied to devices. No level of government should offer legal protection for technological measures applied by someone other than the owner of that device.
- Clarify it is not a circumvention of a technological measure applied to software if that software is part of the fundamental workings of the computer (such as a BIOS, UEFI, and other similar firmware), and such circumvention is required for the owner to remove foreign locks and use their property for any lawful purpose.
- There should be no prohibition on multi-purpose products or services for circumventing technological measures, given circumvention can happen for lawful purposes which must be protected by the government. This is especially true of technological measures applied to devices by other than the owner, where the owner must have access to circumvention tools in order to implement their own security policies and protect their own property, privacy and other rights.
- The criminal provisions, which target the providers of multi-purpose anti-circumvention products and services, must be removed from the bill.
- Clarify that 30.63 enables computer owners to unlock their own mobile devices, game consoles, or other computers in order to implement any security policy. This should include protecting their privacy and other rights from the manufacturers or any other previous owner of these devices.
- Clarify that 30.61 applies not only to interoperability between computer programs, but also interoperability between computer programs and lawfully acquired copyrighted works that are not computer programs. As C-11 is written, technological measures applied to content can be abused to create an anti-competitive tie between commercially available copyrighted works and specific brands of access technology.

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[7] This was discussed in detail in a chapter of *From "Radical Extremism" to "Balanced Copyright": Canadian Copyright and the Digital Agenda* , ISBN-13: 978-1-55221-204-2 . Some lobbiests are falsely claiming this flexibility does not exist, and promote their narrow interpretation as if it were the only interpretation. This is an issue I address in the Bill C-11 FAQ http://c11.ca/faq#wipoguide

[8] Access and Access Controls are a novel concept in Copyright, and can be trivially abused to bypass all other contours of copyright law. http://c11.ca/faq#accessright

[9] Examples include 29.22(c) on reproduction for private purposes, 29.23(b) for time shifting, 29.24(c) for backup copies.

- Drop the word "protection" from the definition of technological measures, and restore to language used in previous bills and the WIPO Internet treaties. It is unclear what these measures are attempting to "protect". Does it mean to protect copyright holders and device manufacturers from the legitimate rights of computer owners, or protect device manufacturers from competition? It has not been proven that these types of measures will reduce copyright infringement or protect the revenues of copyright holders. There is considerable anecdotal evidence which suggests misunderstood and misapplied technological measures induce copyright infringement and reduce revenue to copyright holders.

Worst infringers of technology property rights

When discussing copyright we often hear about the largest "wealth destroyers" being entities like ISOHunt, the Pirate Bay, or similar. These entities most often discussed are not themselves accused of copyright infringement, but are said to "induce" infringement by others, or are "enablers" of infringement.

When discussing the legitimate property rights of technology owners the nature of the infringement, as well as who is infringing, inducing or enabling will of course be different.

Applying a technological measure (digital lock) to someone elses property is an infringement of the owner's property rights, and can be further abused to infringe other rights. A device that obeys the instructions of someone other than its owner can infringe the privacy rights of the owner. The property value to the owner of that property is reduced, given the owner can not use their property for any lawful purpose of their choosing, rather than only those activities authorized or otherwise not restricted by the entity who applied the technological measure. The law abiding activities restricted by the non-owner may be commercial or non-commercial in nature, so can reduce value in a non-commercial way or reduce wealth from commercial activities.

While copyright infringement is not theft[10], it can in some circumstances reduce the value to the owner of the copyright in the same way that infringement of technology property rights can reduce value. This reduction in the value of the property is what we are talking about when we speak of "weath destroyers".

The entities that apply these technological measures to technology are most often the device manufacturers. The top **infringers** are companies such as Apple with their iOS mobile devices, Sony with their playstation game console and other multimedia hardware, and Microsoft with their XBox game console. There are other infringers, but these three have been the most aggressive in applying technological measures, vilifying technology owners, and in lobbying to legalize and legally protect their infringement of technology property rights.

There are copyright holders in the entertainment (recording labels and motion picture/television

[10] Further discussion included in a Hill Times letter on Jan 23, 2012 on p. 11. Text also available via http://c11.ca/5395

studios), entertainment software[11], and other content industries which use technological measures to ensure that their content is only available on hardware where the owners rights have been infringed. While these copyright holders may not be directly infringing, they are **inducing** the conditions which allow hardware manufacturers to infringe. It is inappropriate to allow the entertainment industry to condition the supply of copyrighted works on technology owners having to give up their property rights. Language which prohibits this type of condition is already contained in Canada's Personal Information Protection and Electronic Documents Act[12] (PIPEDA). Given infringement of technology property rights can lead to invasions of privacy, this practise by copyright holders should be similarly illegal.

There are many non-infringing options available to copyright holders. If some copyright holders are uncomfortable selling into a market where citizens own their own technology, they can make their content available in markets where the technology is rented[13] or otherwise owned and controlled by someone they trust. The same options are available for technology as other property, with the home rental market being strong, so there is no legitimacy for copyright holders to claim their fear of citizen owned technology justifies them inducing infringement.

If we want to talk about **enablers** of infringement, these would be policy makers who are proposing, promoting and/or passing laws which legalize and legally protect these infringements or inducements of infringement. The first of the most visible enablers would be Bruce A. Lehman, then Assistant Secretary and Commissioner of Patents and Trademarks in the United States, and author of the 1995 Report of the Working Group on Intellectual Property Rights[14] for the USA's National Information Infrastructure process. This appears to be the first time a government official proposed infringing IT property rights as an alleged solution to copyright infringement.

One of the more aggressive enablers in recent years is Dr. Mihály Ficsor[15], who was intimately part of the process that lead to the two 1996 WIPO treaties. Since that time he has been promoting an interpretation of these treaties which maximizes the infringement of IT property rights. While these treaties contain considerable flexibility, Mr. Ficsor and allies in Canada such as McCarthy Tétrault lawyers James Gannon and Barry Sookman have been claiming this flexibility does not exist.

While I am unaware of any coordinated efforts around those infringing, inducing and enabling infringement of Copyright, there are coordinated efforts when it comes to infringing, inducing and enabling infringement of IT property rights.

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[11] Representatives of the Entertainment Software Association of Canada have been clear that they are targeting technology ownership in their lobbying http://c11.ca/5403

[12] PIPEDIA section 4.3.3 states, "An organization shall not, as a condition of the supply of a product or service, require an individual to consent to the collection, use, or disclosure of information beyond that required to fulfil the explicitly specified, and legitimate purposes." http://laws-lois.justice.gc.ca/eng/acts/P-8.6/

[13] Articles: *An honest expansion of cinema into the home* http://c11.ca/5265 and *Targeting technology ownership rather than copyright infringement* http://c11.ca/5403 discuss the infringing and non-infringing method of creating a closed communications platform.

[14] Report can be seen at http://www.uspto.gov/web/offices/com/doc/ipnii/

[15] One biography is available at http://www.wipo.int/academy/en/meetings/iped_sym_05/cv/ficsor.html

The International Intellectual Property Alliance[16] (IIPA) is a private sector coalition which includes associations controlled by the infringing hardware manufacturers, the inducing entertainment and other content industry, and enabling politicians. Bruce Lehman is currently chairman and president of IIPA, and Dr. Mihály Ficsor was a consultant to IIPA from 2003 through 2008[17].

While the "Special 301" report[18] is authored by the United States Trade Representative, the largest single influence is the IIPA and their pro-infringement and anti-competitive[19] efforts. This report has comically included Canada on its Priority Watch List, primarily for delays in passing legislation which includes legal protection for technological measures. It is likely if Canada passed legislation which fully protected the property rights of technology owners, that the IIPA would continue their agressive pro-infringement campaign and continue to abuse the "Special 301" process.

The Canadian government appears to be happy to be on that list, even though our inclusion is invalid[20]. The false claims in this report have been used to promote the direction the government has taken on technological measures in C-11. Rather than allowing our reputation to be tarnished in order to promote seriously flawed legislation, Canada should participate in the "Special 301" process and provide the evidence to counteract the propaganda presented by the IIPA. Canada is on this list not because Canada is a piracy haven (which we are not), but because the Canadian government appears to wish to be on the list.

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[16] They host a website at http://www.iipa.com/

[17] IIPA Personnel from 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

[18] United States Trade Representative reports http://www.ustr.gov/about-us/press-office/reports-and-publications

[19] I have written how the IIPA would prefer infringement over people switching to competitors of IIPA members http://c11.ca/5115 . In their 2010 submissions to the "Special 301" process they criticised countries which included policies encouraging legally free of charge Open Source. This included situations where paying monopoly rents are unaffordable, with infringement being the only alternative to legally free Open Source.

[20] Many people have commented on the lack of validity of this report, including Nancy Segal (then Deputy Director, Intellectual Property, Information and Technology Trade Policy Division, Department of Foreign Affairs and International Trade) speaking to the Standing Committee on Public Safety and National Security in 2007 where she clarified, "In regard to the watch list, Canada does not recognize the 301 watch list process. It basically lacks reliable and objective analysis. It's driven entirely by U.S. industry. We have repeatedly raised this issue of the lack of objective analysis in the 301 watch list process with our U.S. counterparts." http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=2806944&Language=E&Mode=1&Parl=39&Ses=1#T1150