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Dear Honourable James Scott Peterson, P.C., M.P.
Minister of International Trade

Thank you for your reply letter dated October 13, 2005¹. I have been actively involved in the copyright reform process since the summer of 2001, as an author of software and non-software literary works. I am aware of the position of the government on Bill C-60, and I am writing to inform you that I disagree with that position in a number of ways, including how Canada is represented internationally in this area of policy.

Your letter suggested that Canada is under some obligation to implement the 1996 World Intellectual Property Organization (WIPO) treaties. At the time Canada considered signing the treaties, then-Canadian Heritage Minister Sheila Copps was advised that "**international convention is such that signing in no way binds Canada to ratify the treaties. It is a symbolic gesture.**" If this were otherwise, full consultations on the substance of any treaty would need to have occurred before signing. These treaties were signed by bureaucrats at a time when most citizens and policy makers did not fully understand the benefits of new media, nor had an adequate understanding of the technology these treaties propose to regulate.

The 1996 WIPO treaties are a classic case of policy laundering. The 1995 Lehman report by the United States Patent and Trademark Office (USPTO) failed to have legislation passed, as they were based entirely on satisfying incumbent special interest intermediaries such as publishers and software manufacturing vendors. The USPTO then took this questionable policy to WIPO which in 1996 created two treaties which were then brought back to the USA to become the extremely controversial Digital Millennium Copyright Act (DMCA).

I believe it is misguided to feel pressure from the United States who has signed but not ratified or withdrawn from the Kyoto protocol, and never signed the Ottawa Convention Landmine treaty. Canada should not implement treaties simply because they were signed by bureaucrats, but only implement treaties found to be in the best interests of all Canadians. I strongly believe the 1996 WIPO treaties are not in our best interests.

Rather than following this laundered policy vision of digital copyright, it would be far more consistent with other Canadian domestic and foreign policy goals for Canadian representatives to WIPO and WSIS to be joining with majority world nations and civil society groups towards the Development Agenda².

The second suggestion in your letter was that there have already been hearings on the substance of Bill C-60. While the departments did hold consultations in 2001 and 2002, the hearings that were part of the section 92 review of the Copyright Act by Heritage committee simply do not qualify. The few witnesses invited were largely limited to those interest groups that were relevant back in the 1980's prior to the new digital media which Bill C-60 seeks to regulate. In the few cases where informed witnesses, such as the Canadian Internet and Public Policy Interest Clinic (CIPPIC), were invited they were asked to limit their discussion to issues outside of digital copyright such as photography. While I made a submission and asked to be a witness, I was not invited. This is similar to other potential witnesses outside of the legacy stakeholders.

This is a critical failure of the Government thus far. Digital copyright is not the same as traditional copyright. Traditional copyright regulated primarily commercial activities, with the activities of private citizens such as

1 Letter published at <http://www.digital-copyright.ca/node/1116>

2 Information on WIPO and the Development Agenda can be found on our BLOG at <http://www.digital-copyright.ca/taxonomy/term/361> or on other civil society groups such as http://www.eff.org/IP/WIPO/dev_agenda/, <http://www.cptech.org/ip/wipo/da.html> or http://www.ipjustice.org/WIPO/WIPO_DA.shtml

reading, loaning, or private sale unregulated by copyright. With digital copyright there is an amount of copying, if only ephemeral, involved in any use of the work. While legacy copyright holders and their lawyers claim this new digital copyright grant them the right to control all uses, with no unrelated uses and very few exceptions, parliament must rethink what copyright regulates to restore balance. In order to facilitate this conversation parliament must invite witnesses who are not considered part of the incumbent "copyright industries" or traditional representatives of users such as libraries and educational communities.

Reading Bill C-60 suggests that the Government is not yet ready to move forward on the complexities of digital copyright. If I focus in on one controversial issue, legal protection for technical measures or rights management information, we are talking about changes that are not about "copyright" but what has been called "paracopyright"³. This "paracopyright" is a new layer of legal protection that goes beyond what is already afforded by traditional copyrights and technical measures. Technical measures affect issues such as the authenticity and integrity of documents (including of rights management information), digital signatures, privacy, property, e-commerce business models and other issues which are more appropriately understood as the domain of provincial governments regulating property and civil rights.

It is important that as Canada contemplates "paracopyright" regulation that the federal government not step into areas of provincial jurisdiction.

Technical measures have uses which are appropriate to legally protect, and abuses which are appropriate to protect Canadians from⁴. To talk about technical measures not differentiate between uses and abuses is similar to talking about literature without differentiating between romantic poetry and unlawful hate speech. Bill C-60, if it passes constitutional tests at all, does not adequately differentiate between uses and abuses.

While it is appropriate to give legal weight to technical measures in the appropriate provincial legislation regulating e-commerce, legal protection in the Copyright Act only leads to harmful unintended consequences. Where the federal government must act to modernize is in privacy and competition law to protect Canadians (authors and audiences) from abuses of technical measures.

You further suggested that, "The Government of Canada recognizes the importance of protecting creative works while striking an appropriate balance between creators' rights and users' needs". This statement lacks balance given that both creators and users have rights that must be fully recognized. For creators there are rights of past creators (current copyright holders) and rights of future creators (who build on the past). The Government must reject the "maximalist" copyright agenda by recognize that the limited scope and duration of copyright is not an unnecessary limitation of creators' rights, but a critical recognition of follow-on-creators' rights.

While there are many other rights to discuss such as communications rights, Canadians also have property rights in the content and digital technology which they lawfully purchase. **Bill C-60 diminishes these legitimate property rights without adequate justification, compensation, or any other form of balance.**

I hope you will fully consider these issues. Please contact me for any clarifications or further discussion.

Thank you.

Russell McOrmond

3 Jeremy F. deBeer, Constitutional Jurisdiction over Paracopyright Laws. Chapter 4 of In the Public Interest: The Future of Canadian Copyright Law. ISBN: 1-55221-113-4 . Available for free download online at http://www.irwinlaw.com/books.cfm?pub_id=120&series_id=3

4 I recently wrote an article to try to clarify the uses and abuses of TPMs <http://www.flora.ca/documents/tpm-use-abuse-200510.html>