June 14, 2008

The Honourable Jim Prentice
House of Commons Parliament Buildings
Ottawa, Ontario K1A 0A6

Dear Sir,

As President of the Canadian Communication Association (CCA), I have been asked by the membership to respond to Bill C-61. The Canadian Communication Association is a bilingual, national organization founded in 1980 that brings together communication teachers, researchers and professionals from the university, government and private enterprise sectors.

The CCA is very concerned that the Copyright bill presented by the government on June 12th goes too far in outlawing the lawful use of copyrighted material, and does not take into account the needs of consumers, educators, students, librarians and Canada's creative community. We are especially concerned that there appears to be no reasonable consideration of the already existing practices of "fair dealing" for educators that take seriously the work involved in preparing and delivering digital media content in the classroom. Given this country's proud history of public, accessible education for all, and our leadership role — both intellectual and industrial — in new media and communication technologies, to put such a stranglehold on media education is an affront to Canadian principles built on our national heritage.

As you know, fair dealing is defined in Sections 29, 29.1, and 29.2 of the existing Copyright Act of Canada. It permits unauthorized use of copyrighted material for private study, research, criticism, review, and news reporting, with some attendant requirements of citation. It is not an invitation to copy without restriction; its legitimacy is derived from its usage. How copyrighted material is utilized in the pursuit of these five activities is germane to any judgment of fair dealing.

In 2004 the Supreme Court of Canada unanimously supported fair dealing as a user's right, and instructed that it must not be interpreted restrictively. But, technological protection measures do not distinguish between permissible and impermissible copying — Bill C-61 threatens to remove the access of fair dealing in digital content. If we cannot open it, we cannot use it. This runs contrary to the system of intellectual property as embodied through copyright. Extensive as the rights afforded to copyright owners are, they do not include the right to prohibit fair dealing. As the Supreme Court has said, fair dealing is always available.

As noted by many members of the CCA, the most troubling (some would say "devious") aspect of Bill C-61, lies in the proposed Section 29.21:

If the individual has downloaded the work or other subject-matter from the Internet and is bound by a contract that governs the extent to which the individual may reproduce the work or other

subject-matter, the contract prevails over subsection (1) to the extent of any inconsistency between them. The same principle appears to apply to digital locks placed in physical media.

Essentially, this government has decreed that contract and digital locks override the Copyright Act of Canada. Contracts and digital locks can control what kind of usage is permitted with copyrighted material. Fair dealing will evaporate if eclipsed through contract and digital locks, which raises very troubling questions for research and scholarship. If individuals are required to seek permission, or provide payment, in order to exercise their creative aspirations, Canada's innovative future looks bleak.

In Canada, intellectual property is rapidly becoming absolute property, and this will have a "chilling effect" on our culture. For nearly three hundred years, intellectual property regimes have held intellectual property to be a system of limited rights to ensure that the creativity it claims to support does not stifle the creative aspirations of others. In effect, Bill C-61 abrogates fair dealing and cultural production in favour of conditions determined by manufacturers and distributors of cultural products rather than their creators.

Canada's copyright laws need to advance Canada's interests. This means asserting our leadership role in media education by promoting critical learning and integrating media in the classroom - not legislating it out of bounds. What is remarkable is that while you seem to have adopted wholeheartedly the more draconian aspects of American legislation evident in their DMCA, you have ignored its most democratic element: fair use. As section 107 of American copyright legislation states in full:

§ 107. Limitations on exclusive rights: Fair use

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
(2) the nature of the copyrighted work;
(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
(4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

Furthermore, section 108 provides protection to libraries and archives engaged in research and preservation work for the betterment of society:

§ 108. Limitations on exclusive rights: Reproduction by libraries and archives 41

(a) Except as otherwise provided in this title and notwithstanding the provisions of section 106, it is not an infringement of copyright for a library or archives, or any of its employees acting within the scope of their employment, to reproduce no more than one copy or phonorecord of a work, except as provided in subsections (b) and (c), or to distribute such copy or phonorecord, under the conditions specified by this section ...

This expresses a commitment to education as a public good and a conception of students as citizens. Educational uses are not special interests; they *serve* the public interest. Rights-holders are obviously protected under US law, but judgment about whether a particular use is "fair" takes into account how and to what purpose the material is being used, the amount of the work being used, and the effect on a market. The educational use of copyrighted products for purposes of teaching and research will not result in market failure; it will result in the growth of new, critically aware, audiences. Here in Canada, "fair dealing" was once largely equivalent to the US's "fair use". While fair dealing still exists in principle in Bill C-61, the "fine print" concerning contract and digital locks render fair dealing largely irrelevant and, in so doing, undermines education and research at every level.

Canada deserves better than what you have proposed. Our students deserve better. What chance have they in the global mediated economy if they do not receive the best possible education that both integrates and critiques digital media?

Please ensure that this bill truly reflects the democratic principles of Canadians by allowing all Canadian stakeholders a say in its final contents. That means meaningful consultation in the coming months, and opening up Canada's copyright policy to more than just the special interests that lobbied behind the scenes for this law. The CCA urges you to rethink to whom you are ultimately accountable: Canadian citizens or corporate lobbyists.

Sincerely,

Dr. Dale Bradley
President
Canadian Communication Association/Association Canadienne de Communication
http://www.acc-cca.ca/